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REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA.

E. C. EBERSOLE,
REPORTER.

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" WILLIAM H. SEEVERS, Oskaloosa,	
" JOSEPH R. REED, Council Bluffs,	

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	JOSEPH LYMAN, Circuit Judge.
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REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
DUBUQUE, OCTOBER TERM, A. D. 1883.

IN THE THIRTY-SEVENTH YEAR OF THE STATE.

PRESENT:

HON. JAMES G. DAY, CHIEF JUSTICE,	
" JAMES H. ROTHROCK,	
" JOSEPH M. BECK,	
" AUSTIN ADAMS,	
" WILLIAM H. SEEVERS,	
	} JUDGES.

WINKLEMANS V. THE DES MOINES NORTHWESTERN R'y Co.

1. **Continuance: FACTS WARRANTING DENIAL OF.** A motion for the continuance of this cause was properly overruled, because it appears from the facts of the case (see opinion) that the moving party, notwithstanding the grounds of its motion, had ample time to produce its witnesses, and was not prejudiced by the ruling of the court.
2. **Railroads: RIGHT OF WAY: DAMAGES.** Where a railway company, in laying its road across a farm, destroys a valuable spring, that fact should be considered in estimating the damages, and evidence as to the character of the spring, and of its destruction, is admissible.

62	11
78	443
62	11
86	548
62	11
105	689
62	11
116	86
62	11
128	349
62	11
132	181
62	11
137	443
62	11
141	602
142	153

3. ———: ———: ———: EVIDENCE. A witness who is called to testify as to the damages to a farm arising from the taking of a portion of it for railway purposes, may testify as to what other lands sold for in the same neighborhood, for the purpose of showing his knowledge of the value of land in that vicinity; and, for the same purpose, he may state what he has heard others say concerning sales of land made by them.
4. **Practice:** CROSS-EXAMINATION. Where defendant's counsel were absent during the examination in chief of plaintiff on his own behalf, it was not competent to require him, by general questions on cross-examination, to make a recital of what he had testified in chief.
5. **Railroads:** RIGHT OF WAY: DAMAGES: WHOLE FARM TO BE CONSIDERED. On a question of damages caused to a body of land used, improved and occupied as one farm, by the construction of a railroad across the same, the whole farm must be considered, and testimony offered as to the damage to separate portions of the farm was properly excluded.
6. ———: ———: ———: EVIDENCE. On the trial of such question, it was not competent to ask the commissioners, who had assessed the damages in the first instance, whether their assessment correctly expressed their judgment; but they might be asked for their judgment at the time of the trial on appeal.
7. ———: ———: ———: ———. Where a spring was destroyed by a right of way taken for a railway, it was not error, in a trial of the question of damages to the land, to allow one of the company's witnesses, who had testified to the damage, to be asked on cross-examination how much damage the destruction of a spring of a certain capacity would be to the land.
8. ———: ———: ———: PRACTICE: SPECIAL INTERROGATORIES. In submitting to a jury a cause involving the damages caused by taking the right of way through a farm for a railroad, the court properly refused to submit special interrogatories, asking the opinion of the jury as to the damages to separate parts of the farm, and other interrogatories which related to questions not involved in the case.
9. ———: ———: EXTENT OF RIGHT: STATUTE CONSTRUED. The restriction as to what is "necessary," in section 1241 of the Code, applies to the quantity of land to be taken for right of way, and not to the quantity of earth, gravel, stone, timber, etc., which may be removed from the land condemned. But the railroad company may not wantonly destroy timber, or use earth, etc., for other purposes than those provided in the statute.

Appeal from Carroll Circuit Court.

WEDNESDAY, OCTOBER 17.

THIS is a proceeding for the condemnation of a right of

Winklemans v. The Des Moines Northwestern R'y Co.

way for the defendant's railroad through the farm of the plaintiff. The sheriff's jury appraised the plaintiff's damages at \$500. The plaintiff appealed, and a trial by jury was had in the circuit court, and the damages were assessed at \$2,100. The defendant appeals.

Parsons & Runnels, for appellant.

McDuffie & Howard and *H. Potter*, for appellee.

ROTHROCK, J.—I. The farm of the plaintiff is situated in Greene county. The appeal from the assessment of the sheriff's jury was taken to the October term, 1881, of the circuit court for that county. The parties appeared at that term and, upon the application of the defendant, the place of trial was changed to the circuit court of Carroll county. At the January term, 1882, the cause was continued upon the application of the defendant. At the September term, 1882, and on the twenty-sixth day of that month, the cause was reached for trial in the regular course of the business of the term. The plaintiff appeared with his counsel, and, no one appearing for the defendant, a jury was impaneled to try the cause, and the plaintiff was examined as a witness, and the court adjourned until 9 o'clock, September 27, at which time the defendant's counsel appeared and filed a motion asking that the trial be set for some future day in the term, not earlier than Friday of that week. In an affidavit filed with the motion, it was stated that it would be possible for the defendant, with great effort, to prepare for trial, if two days were allowed him therefor. The motion was overruled, and on that day the trial of the cause proceeded until the evidence of the plaintiff was introduced, and, by agreement of parties, further proceedings were postponed until the morning of September 28. The trial was not resumed until the twenty-ninth of September. On that day a portion of the defendant's evidence was introduced, and on the thirtieth of September the taking of the evidence was concluded.

1. CONTINU-
ANCE : facts
warranting
denial of.

Counsel for defendant claim that the court erred in overruling the motion to set the cause down for trial at some future day of the term. The affidavit made by counsel in excuse for failure to appear when the cause was reached for trial is quite voluminous. It recites the fact that one member of the partnership of counsel for defendant was then, and had been, very dangerously sick. It also sets forth pressing business engagements of the other partner, his necessary attendance upon other courts, and his sickness, besides other grounds of excuse. We have not thought it necessary to set out this affidavit in full. We think that, in view of the time afterwards taken in the trial of the cause, and the postponement of it for one day without anything being done, the court did not err in overruling the motion. The motion was made and overruled on the twenty-seventh of September, and the cause was open for the examination of witnesses and the submission of evidence up to and including the thirtieth day of the same month. This delay gave ample time for defendant to produce its witnesses.

II. The farm of the plaintiff consists of 222 acres. The right of way upon which defendant's road was constructed passes through the farm in such a manner that
2. RAILROADS:
right of way:
damages. two hundred acres are on one side of the railroad, and about twenty-two acres on the other side. The farm buildings are on the twenty-two acres, and the tillable land is mostly, if not all, on the two hundred acres. The plaintiff claimed upon the trial that he had a valuable spring upon the land appropriated for the right of way, which, in building the railroad, was entirely destroyed by placing an embankment several feet in height over the spring. He produced witnesses, who testified to the character of the spring, and to the fact that it was destroyed by the railroad embankment.

It is claimed that this was improper evidence, because the plaintiff could not enhance his damages by showing that the railroad was negligently or improperly constructed; and the

destruction of the spring could not be shown as a separate item of damages.

We think the evidence was competent, and deem it sufficient to say that the plaintiff did not by the evidence seek to show that the road was improperly constructed. No witness was asked whether the embankment which destroyed the spring was necessary to the proper construction of the road. It will be presumed that it was necessary. And the plaintiff did not seek by the evidence to show the destruction of the spring as a separate item of damages.

III. Objection was made to certain questions propounded by the plaintiff to a witness named Jay, who was introduced
 3. —: —: for the purpose of showing the damages to the
 dence. evi- farm. The witness stated that he resided for two years upon what was known as the Parks farm, within half a mile of the farm in question. He was asked by plaintiff's counsel if the Parks farm had been sold. He answered that it had been sold; and in answer to a further question he stated that it had been sold for \$35 per acre. It was objected that it was incompetent for the witness to give evidence of particular sales. We have no means of knowing the connection in which these questions were asked. If they were for the purpose of showing the witness' knowledge of the value of land in the neighborhood, they were competent.

IV. Another witness was interrogated as to the sale of the Parks farm, and answered that he knew of the sale by what Parks told him. The defendant moved to
 THE SAME. strike out this evidence because it was not responsive to the question, and because it was mere hearsay as to a single transaction, and the witness was not, therefore, competent to testify as to value.

These objections, we think, were properly overruled. The knowledge which qualifies a witness to testify as to values must necessarily consist largely of hearsay. The examination of market reports, and information acquired from others

Winklemans v. The Des Moines Northwestern R'y Co.

as to sales of property, qualify a witness to testify as to values. It appears in the examination of some of the witnesses that they did not consider the Parks farm as valuable as plaintiff's farm, and the abstract shows that the first mention of the Parks farm was made by a witness on his cross-examination by defendant's counsel. And this is not at all surprising. The usual rule in such cases is to call a witness and ask him generally if he has a knowledge of the value of the property in question, or property of that kind. If he answers that he has, he is allowed to state the value in his judgment, and on cross-examination his means of knowledge or qualification to testify upon the subject is particularly inquired into, if counsel desires to make such inquiry. If he shows upon the cross-examination that his knowledge of values is limited, his testimony is not for that reason to be stricken out, but it goes to the jury for what it is worth. These remarks apply to the testimony of the witnesses Head and Millett, as well as to the last above objection. We discover no error in any of these rulings. There was a sufficient showing that the witnesses had the requisite qualifications to testify as to value.

V. As has already been stated, the plaintiff was examined as a witness in his own behalf in the absence of defendant's counsel. The record shows that he had testified 4. PRACTICE: cross-examination. that his farm was worth \$50 an acre before defendant's right of way was taken from it, and that after the road was located across it the farm was not worth more than half that amount. He also testified to the destruction of the spring, much the same as the other witnesses did who testified after the arrival of defendant's counsel.

When the plaintiff rested his case, the defendant called the plaintiff as a witness, and, after examining him with great particularity as to the location of the farm and the manner in which it was affected by the railroad having been constructed through it, he was asked whether he stated in his examination in the absence of defendant's counsel anything about the amount of damages, and, if so, what he said. The

question was varied and put in many different forms, in all of which the defendant sought to have the plaintiff repeat the testimony which he had given to the jury. The plaintiff's counsel objected to this line of examination, and the objections were sustained. After examining the witness at great length, some question was made as to whether the examination was an examination in chief, or a cross-examination. The court stated that the rulings had been made upon the ground that the defendant had called the witness as its own. Counsel then asked that he be permitted to cross-examine the witness, and he was permitted to do so. After this, counsel was permitted to ask the witness in cross-examination as to particular statements which had been made by him in his examination in chief, but the court refused to allow the witness to be asked generally what he had stated when a witness in the examination in chief. For instance, he was allowed to be asked if, in his examination in chief, he was interrogated as to the value of the farm and the amount of damages, and what the witness took into consideration in estimating the damages. Answers were made to all questions of this character, but defendant was not permitted to require witness to make a recital of what he had testified to, by asking general questions. This examination of the plaintiff as a witness, both before leave was given to cross-examine him and afterwards, covered every conceivable question in the case. The examination of the witness by defendant's counsel covers some fifty-three pages of the abstract. It is claimed that the court erred in its rulings pending this examination. We are very clearly of the opinion that no error occurred in confining the examination to an inquiry as to particular questions arising in the case. As to the other objections, we need not examine them in detail. We think counsel was allowed the utmost latitude in the examination.

Our attention is called by counsel to rulings of the court on pages 55 and 56 of the abstract. The counsel there asked the witness to put a value upon certain parts of his

VII. The defendant asked that a number of special interrogations be submitted to the jury. The request was refused, and this action of the court is complained of. These questions were not proper to be submitted to the jury. They asked the jury to find

the value of parts of the farm considered alone and apart from the other parts. This was not practicable under the proof. Other questions called upon the jury to say how much if any damages they estimated for filling up the spring, and whether, if the railroad had been properly located and constructed, the spring would have been filled up or destroyed. We have seen that there was no question in the case as to whether the construction was proper or improper. It is to be presumed that the road was properly constructed; and the court instructed the jury that they must not allow anything for the loss of a spring as a spring, and separate and distinct from the farm, but that if in appropriating the right of way and building the road any spring was destroyed, that was a proper subject to be considered.

VIII. The most of the charge given by the court to the jury was excepted to, and the defendant asked certain ^{9. —; —: instructions which were refused, and exceptions} _{extent of right: statute construed.} were taken. Among other instructions, the court gave the following:

"6. The land which the defendant has taken for its right of way is a strip of ground one hundred feet in width, and lying fifty feet on either side of the center line of the track of defendant's railroad, as the same is laid upon the surface of the ground. The right which the defendant acquires to this strip of ground is a right to fence it off from the adjoining lands on either side, and construct and operate its railroad thereon.

"7. It may also take, remove and use for the construction and repair of said railway and its appurtenances, any earth, stone, gravel, timber, or other materials, on or from the land so taken. The right is a perpetual one at the option of the defendant; that is, it will continue so long as the defendant, or any person or corporation claiming under it, sees fit to and does use said land for railway purposes.

"8. If, at any time, the railway built upon this right of way should cease to be used or operated for a period of eight

consecutive years, the land embraced in said right of way, and the title thereto, would revert to the person who then owned the adjoining land."

It is urged that paragraph seven of these instructions is erroneous, because it does not limit the right to remove earth, stone, gravel, etc., from the right of way to such quantities as may be necessary for the purpose of the construction and repair of the railroad. The statute provides that "any railway corporation * * * may take and hold * * * so much real estate *as may be necessary* for the location, construction and the convenient use of its railway, and may also take, remove and use for the construction and repair of said railway and its appurtenances, any earth, gravel, stone, timber, or other material, on or from the land so taken." Code, § 1241.

The instruction complained of is in the language of this section of the law, so far as it applies to the removal of stone, earth, gravel, etc.

The restriction as to what is necessary applies to the quantity of land to be condemned, and not to the quantity of the materials named to be used in construction and repair. This cannot be made plainer than the statute makes it. Of course, the railroad has no right to wantonly destroy timber, or use earth for other purposes than the statute provides, and there is no conflict between the instruction in this case and the case of *Preston v. Dubuque & Pacific R. R. Co.*, 11 Iowa, 15. In that case the court erroneously instructed the jury that the R. R. Co. had the right to "destroy or appropriate the entire timber on the strip, if the company should deem it necessary or convenient so to do." No such right can be deduced from the instructions in this case.

There are other objections to the instructions to the jury, and to the refusal to give instructions, which we do not deem it necessary to consider in detail. It is enough to say that the instructions given appear to us to cover every question in the case in a clear, concise and perspicuous manner, and we find no error in them.

AFFIRMED.

HOLLENBECK V. THE CITY OF MARSHALLTOWN.

1. **Former Adjudication: SPECIAL VERDICT: AVOIDED BY NEW TRIAL.**

Where a jury made a special finding of fact, upon which the defendant moved for judgment, notwithstanding the general verdict for plaintiff, and also moved for a new trial subject to its motion for judgment, and the court overruled the motion for judgment, but granted a new trial, *held* that the order gave a new trial to both parties upon all the issues, and that the special finding of the jury did not adjudicate the fact found by them, as between the parties.

2. **Challenge to Jurors: RESIDENTS OF DEFENDANT CITY.** Where a city is defendant in an action for damages, it has no right to challenge a juror on the ground that he, though a resident of the city, is not a taxpayer.3. **Cities and Towns: INJURY ON SIDEWALK: EVIDENCE: FACTS, NOT OPINIONS.** In an action based on injuries caused by a defective sidewalk, it was not competent for witnesses for defendant to testify that plaintiff limped when she was observed, but did not limp when she was not observed, because whether she was observed or not must have been a matter of opinion. The witnesses were properly confined to a statement of facts as seen by them. For a like reason, it was not competent for a witness to state whether or not the walk was ordinarily good or not.4. **Verdict: EVIDENCE TO SUPPORT.** Where a cause has been twice before tried before the same judge, and with the same result, and the verdict has been as often set aside, and on the third trial the judge has refused to set aside the verdict and grant a new trial, this court will not interfere, even though it may have doubts about the sufficiency of the evidence to sustain the verdict.*Appeal from Marshall District Court.*

THURSDAY, OCTOBER 18.

THIS is an action to recover for a personal injury which, it is alleged, was received by plaintiff by reason of a fall upon a defective sidewalk. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.

Brown & Carney, for appellant.

Sutton & Childs, for appellee.

ROTHROCK, J.—I. The sidewalk where the injury was re-

68	21
80	369
62	21
101	83
62	21
124	688
62	21
140	671
62	21
1143	739

ceived was upon one of the principal streets of the city. It was constructed by placing two stringers lengthwise of the street, with two inch planks nailed across the stringers. The walk was some four feet in width. On the evening of the twenty-first of April, 1880, and after night-fall, the plaintiff and another woman were going along the walk, and the other woman stepped upon a loose plank in the walk and tipped it up, and the plaintiff came in contact with the plank, or stepped into the opening, and fell and was severely injured. An action was brought against the city to recover damages for the injury. A trial was had, which resulted in a verdict for the plaintiff for \$3,000. The verdict was set aside and a new trial granted. A second trial was had, which resulted in a verdict for \$1,150, which was also set aside and a new trial granted. The cause was again tried, and a verdict of \$1,000 was returned. Motions in arrest of judgment and a motion for a new trial were overruled, and judgment was entered upon the verdict. From this judgment the present appeal was taken.

Counsel for appellant contend that the only possible ground upon which the jury could have found the defendant liable was that the walk, at the point where the accident happened, was so openly and notoriously defective as that the proper officers of the city should, in the exercise of reasonable and ordinary diligence, have known of the defect and repaired it. And it is claimed that the jury, on the second trial, found, in answer to a special interrogatory, that the defect was not so open and notorious as to render the city liable for injuries resulting therefrom. It appears that the jury did so find at the second trial, and the defendant moved for judgment in its favor on the special finding, and also moved for a new trial, subject to the motion for judgment. The court overruled the motion for judgment upon the special finding, and sustained the motion for a new trial. From these rulings no appeal was taken.

It is now claimed that the said special finding is an adju-

dication binding upon the plaintiff. We think otherwise. The order setting aside the verdict on the second trial gave a new trial to both parties upon all the issues in the case, the same as if no trial had ever been had. The point requires no further attention. It appears to us that the mere statement of it is sufficient to support our conclusion.

II. The defendant challenged some of the jurors, because it appeared that, while they were residents of the city, they were not tax-payers. The challenges were overruled.

2. CHALLENGE to jurors : residents of defendant city. This is made the ground of an objection to the jury.

The ruling of the court on this question was correct. In *Dively v. The City of Cedar Falls*, 21 Iowa, 565, and in *Davenport G. L. & C. Co. v. The City of Davenport*, 13 Id., 229, it was held that it was no abuse of the discretion of the court to exclude from the jury tax-payers, residents in the cities which were defendants in those actions. Of course, if this was not error, it would not be erroneous to try the case by jurors who were not tax-payers in the city.

III. Certain witnesses were examined by the defendant, who testified that the plaintiff, after the injury, when walking, at times was not lame, and at other times

3. CITIES and towns : injury on sidewalk : evidence : facts, not opinions. she limped. It was sought to show by these witnesses that when the plaintiff saw them she changed her gait from a perfect walk to a limp.

The court refused to allow the witnesses to state that this change took place when the plaintiff saw that she was observed, because, whether or not she saw that she was observed, was a matter of opinion. Appellant's counsel complain of these rulings. We think this was no error, especially in view of the fact that the witnesses were permitted to state that they had seen plaintiff when she did not limp at all, and then immediately, upon turning her face in the direction of the witnesses, she limped very much.

Other objections are made to rulings on the admissibility of evidence. One witness was asked whether the walk in question was an ordinarily good walk or not, and an objec-

tion to the question was sustained. This was correct. It is plain that the question sought the opinion of the witness as to whether or not the walk was a good one.

IV. The court refused to give any of the instructions to the jury asked by the defendant, but gave full instructions upon its own motion upon all the issues in the case. These instructions properly applied the evidence to the issues, and throughout they were as favorable to the defendant as it had any right to ask.

There was no evidence that there was any actual notice to the proper officers of the defendant that the walk was out of repair, and the court instructed the jury that there was no such evidence. There was some question made in the evidence as to whether the original construction of the sidewalk was defective, but this was practically taken from the jury by the instructions of the court. We deem it sufficient to say, without setting out the charge of the court at length, that it fully and fairly instructed the jury upon the questions whether the defect in the sidewalk was and had been so open, observable and notorious that it should have been seen and repaired by the city officers before the accident, and whether or not the plaintiff exercised the proper care and caution, in traveling upon the walk, to free herself from contributory negligence. A careful examination of the instructions given and those refused leads us to the conclusion that there was no error in this regard.

V. A more serious question is whether the evidence as to the open and notorious character of the defect was such as
4. VERDICT: to justify the verdict of the jury; and we are free
evidence to
support- to say that upon this question some of us have
very serious doubts. If nothing were shown but the fact that the plank in the walk was loose, and that it remained in its place, we would be agreed that the verdict could not be sustained. But there was evidence that before the accident the board had been out of its place and out in the street, and so remained for days at a time. Several witnesses testify to this

fact. It appears from the evidence of these witnesses that the plank was at some times out of and at other times in the walk, for sometime before the plaintiff was injured. Some of the witnesses testified that they threw the plank out of the walk and into the street, and then some one would put it back in its place again. And one witness stated that the plank was out for a week at a time. Now, it is not made absolutely certain that the plank these witnesses testify about was the one which tipped up and caused the injury, but we think the jury were fairly warranted in so finding.

On the other hand, many witnesses were examined, who testified that they passed over the walk daily, and that there were no loose planks at the point where plaintiff was injured. And one witness testified that two weeks before the accident he repaired the walk and nailed down all the loose boards. In this state of the testimony, it is apparent that we cannot interfere with the verdict. We have not stated all of the evidence, and some of us, as we read it in the abstract, would have been better satisfied if the learned judge who tried the case had set the verdict aside. But the record shows that the cause had been twice tried before the same judge, with the same result, and we cannot be put in his place, and have all the aids which an examination of witnesses in open court affords.

There are some minor questions raised by counsel to which we have not alluded in this opinion. They do not seem to us to have had any influence in the determination of the case, and we find no error in them. The judgment of the district court must be

AFFIRMED.

SALE V. THE FIRST REGULAR BAPTIST CHURCH OF MASON CITY.

1. **Mandamus:** TO REINSTATE ONE EXPELLED FROM A CHURCH. *Mandamus* will not lie to compel a religious corporation to reinstate a member of the church who has been expelled therefrom, in a case where the expulsion was not a corporate act, and did not affect any property interest or other valuable civil right of the expelled member.

Appeal from Cerro Gordo Circuit Court.

THURSDAY, OCTOBER 18.

THE petition states that the defendant is a corporation; that the plaintiff was a member thereof and entitled to enjoy all the privileges and franchises pertaining to such membership; that the plaintiff was notified by the clerk or secretary of the defendant that at a meeting of the corporation she "was expelled therefrom, and cut off and cast out from her privileges and franchises as a member of the organization." The notice referred to is as follows:

"MASON CITY, IOWA, Jan. 25th, 1882.

"MRS. S. C. SALE,

"DEAR MADAM:

"It has become my duty as clerk of the First Baptist Church of Mason City, Iowa, to inform you that at a meeting of the Church, held on Tuesday, January 24th, inst., for insufferable offenses against the Church, the hand of fellowship was withdrawn from you.

"Respectfully Yours,

"J. G. BROWN, Ch. Clerk."

"That plaintiff had no notice of said meeting, nor had she any notice of any charge having been preferred against her, nor had she transgressed or violated any rules of said corporation, nor had she neglected to do any duty incumbent upon her by reason of her membership in said body; and plaintiff is informed and believes no charges were ever

preferred against her. That after the action aforesaid the plaintiff made the following written request and demand of defendant, to-wit:

“‘To the First Regular Baptist Church of Mason City, Iowa:

“‘Mrs. S. C. Sale, having received notification from the Clerk of the Church of the withdrawal on the 24th day of January, 1882, of the hand of fellowship from her for insufferable offenses against the Church, and knowing, as all Baptists do know, that such action, in such manner and method, and at such a time as was then taken, was in violation of all existing principles, regulations or usages of the denomination:

“‘Therefore she requests that any and all record of said action be expunged from the record, and that, if there be any charges against her, her accuser or accusers and the charges be at once made known to her.’”

That afterward the defendant took action upon such request as follows:

“After prayer-meeting, Thursday evening, February 9th, 1882, Mrs. S. C. Sale presented a written request that the church reconsider its action of January 24th, 1882, when the hand of fellowship was withdrawn from her (to-wit, Mrs. S. C. Sale). On motion the church voted to indefinitely postpone the consideration of the matter.”

That by the rules and laws governing such organization it was the duty of the defendant to notify the plaintiff of any charges against her, and give her an opportunity to defend the same by citing her to appear and answer the same. That plaintiff was unlawfully expelled by said corporation in violation of the rules and by laws thereof. A copy of the Articles of Corporation, and a “copy of the rules and regulations of said church government in matters of discipline of members,” are attached to and made a part of the petition. The relief asked is that a writ of *mandamus* issue commanding defendants to reinstate plaintiff as a member of the corporation. To the petition there was a demurrer, which was overruled,

Sale v. The First Regular Baptist Church of Mason City.

and, defendant electing to stand thereon, final judgment in favor of the plaintiff was entered. The defendant appeals.

Glass & Hughes and *Miller & Cliggett*, for appellant.

Blythe and *Markley*, for appellee.

SEEVERS, J.—When rights of property are in controversy, it is conceded by counsel for the appellant that the courts have the jurisdiction and power to inquire as to the proceedings of an ecclesiastical body which affect such right. And, on the other hand, as we understand, counsel for the appellee concede that, if there was no corporation, the courts could not inquire and determine whether the plaintiff had been lawfully expelled from the church for unchristian conduct, or for non-compliance with the rules and discipline of the church. But the appellee insists that, as a member of the corporation, the plaintiff was possessed of certain rights, for the protection of which she may appeal to the courts. This we understand to be the single question to be determined. The demurrer admits all the allegations of the petition which are well pleaded, and no more. The petition states that the corporation expelled the plaintiff, but this is a conclusion from the facts pleaded, and we have to inquire whether the allegation is true, and, if so, whether the plaintiff has been deprived of a valuable right. The corporation and church, in so far as the discipline of the latter is concerned, are not identical. The object of the corporation is declared to be “purely religious, and the building up of a church membership.” To that end it has charge of all the interests and property which is now owned, or may hereafter be owned, by the “First Regular Baptist Church, of Mason City, Iowa.” It also has power to acquire property, and sue and be sued, and all powers enjoyed by “corporations organized for religious purposes under the existing laws of Iowa.” The officers of the corporation consist of five trustees, clerk and treasurer. The trustees have the care of the property, both real and personal, and

Sala v. The First Regular Baptist Church of Mason City.

manage the affairs of the corporation. New members shall be admitted to membership, and other members released therefrom, according to the rules governing the Regular Baptist denomination of the United States. Certain "rules of church government in the matter of the discipline of members" are made a part of the petition, but it does not appear that such rules have been adopted by, or can be regarded as by-laws or rules governing, the corporation. The only and primary object of the corporation is the acquisition and taking care of property. The rules of the church as to the discipline of members have no relation to the corporate property or corporate matters. Now, it is quite clear that the plaintiff was expelled or cut off by the church for "insufferable offenses" against the church. The "hand of fellowship was withdrawn," not by the corporation, but by the church. The plaintiff sought to be restored to the church, and the church voted to indefinitely postpone the application." The corporation is not managed by the church, but by trustees. The latter have taken no action in relation to the plaintiff, nor has she been expelled therefrom by any action of the corporation, unless what was done by the church amounts to expulsion from the corporation. It will be conceded that all members of the church have the right to vote for and select the trustees of the corporation, and it will be conceded that the plaintiff has been deprived of this right by ceasing to be a member of the church. For some alleged offense against the church, the plaintiff has been expelled therefrom by the church. This is a purely ecclesiastical question into which we cannot enquire. By virtue of her church membership, the plaintiff became a member of the corporation, entitled only to the rights and privileges of a member of a corporation organized for religious or ecclesiastical purposes. The corporation was not organized for pecuniary profit. No such profit can possibly accrue to any member. No property interest, or any other valuable civil right, has been affected by the action of the church. The plaintiff

The Dist. Twp. of Spencer v. The Dist. Twp. of Riverton et al.

has not and cannot suffer any civil damages whatever. This view is in harmony with *Hardin v. Baptist Church*, 51 Mich., 137, where numerous authorities are cited. See also the later case of *Livingston v. Trinity Church*, 16 Vroom, 230. We are of the opinion that the court erred in overruling the demurrer.

REVERSED.

THE DIST. TWP. OF SPENCER V. THE DIST. TWP. OF RIVERTON ET AL.

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| 62 | 30 |
| 86 | 149 |
| 62 | 30 |
| 101 | 268 |
| 62 | 30 |
| 118 | 583 |
| 62 | 30 |
| 129 | 503 |
1. **Statute of Limitations: EQUITABLE ACTIONS.** The statute of limitations applies to actions in equity as well as at law. *Relf v. Eberly*, 23 Iowa, 467, followed.
 2. ——— : **NEW ACTION AS CONTINUATION OF A FORMER ONE.** While the time for the commencement of an action may be extended by section 2537 of the Code, in a case where a former action has failed for any cause other than negligence, that section does not extend the time for bringing into existence the conditions without which no action can be maintained. Accordingly, where a demand was necessary, and it was not made until after the time of the statute had run against the claim, *held* that the claim was barred, notwithstanding it might otherwise have been saved under the provisions of said section.

THURSDAY, OCTOBER 18.

Appeal from Clay District Court.

THIS action is an equitable one, and was commenced on the fifteenth day of October, 1881. The petition alleges, in substance, that for the year 1872 an illegal school tax was levied upon the district township of Spencer, and collected and paid over to the treasurer of said district township; that the territory now included in the defendants then formed a part of the territory of the plaintiff, and that, in the year 1874, the defendants were formed out of said territory; that the boards of directors of the plaintiff and the defendants

made an equitable division of the assets and liabilities, but did not take into account said illegal tax, because it was not then known whether said tax would be refunded; that in April, 1876, the board of supervisors of Clay county ordered that said illegal tax be refunded, and the treasurer of said county has refunded \$1,736.67 thereof, all out of money in his hands belonging to plaintiff, which refunding was made April fifth, and May sixteenth, 1876; that after July first, 1881, and before October fifteenth, 1881, the plaintiff presented its claim to the board of directors of each of the defendants, and asked that it be audited and allowed, which was refused; that this action was originally commenced at the April, 1879, term, and on the 23d of April, 1881, plaintiff failed in said action, upon defendants' demurrer to the petition being sustained in the supreme court, which failure was not caused by negligence in the prosecution of said action. Plaintiff prays an accounting and judgment against each of the defendants. The defendants demurred to the petition upon the ground, among others, that the petition shows upon its face that the cause of action is barred by the statute of limitations. The court sustained the demurrer. The plaintiff appeals. For the former opinion in this case, see 56 Iowa, 85.

E. E. Snow, for appellant.

Hubbard and Hughes, for appellee.

DAY, CH. J.—I. It is insisted that the statute of limitations does not apply to equitable actions. That this is not the rule in this state was determined in *Relf v. Eberly*, 23 Iowa, 467.

II. The plaintiff insists that the bar of the statute is removed, under section 2537 of the Code, by the failure of the original action without negligence in its prosecution, and the commencement of this action within six months after the determination of the former action in the supreme court.

The Town of Eldora v. Burlingame.

Whilst the time for the commencement of the action may have been extended under this section, it cannot be claimed that this section extends the time for bringing into existence the conditions without which no action can be maintained. The money was refunded in May, 1876. Then the cause of action accrued, and the statute of limitations began to run. It was, however, a condition precedent to the right to maintain an action that the claim should be presented to the board of directors to be audited and paid. See 56 Iowa, 85. The plaintiff could not prevent the running of the statute of limitations by neglecting to present the claim for allowance and payment. *Baker v. Johnson County*, 33 Iowa, 151; *Prescott v. Gonser*, 34 Id., 175; *Beecher v. The County of Clay*, 52 Id., 140. The cause of action accrued on the 16th day of May, 1876. The claim was not presented for allowance until after July 1, 1881. The pendency of the former action could not extend the time within which the claim should be presented for allowance. The cause of action was barred when the claim was presented. It follows that the demurrer was properly sustained.

AFFIRMED.

62 39
86 501
62 32
90 536
62 32
122 682

THE TOWN OF ELDORA V. BURLINGAME.

1. **Criminal Law: INFORMATION UNDER TOWN ORDINANCE: DUPLICITY: SURPLUSAGE.** Where an information under a town ordinance charges an offense punishable under the ordinance, and also an offense punishable only under the laws of the state, the information is not bad for duplicity, but that portion charging an offense of which the town has no jurisdiction may be disregarded as mere surplusage, and it will not vitiate a judgment of conviction for the other offense.
2. ———: ———: ———. Where a town ordinance authorized "any number of violations of the ordinance to be included in one complaint," an information under the ordinance, charging more than one offense as defined therein, was not bad for duplicity.

The Town of Eldora v. Burlingame.

3. Cities and Towns: ORDINANCE: PART ILLEGAL—REMAINDER VALID.

Where an ordinance, besides prohibiting the sale of malt and vinous liquors, which the town had authority to do, prohibited also the sale of intoxicating liquors, which it had no power to do, *held* that the ordinance could be enforced as to the sale of malt and vinous liquors.

4. ———: ———: EVIDENCE OF PUBLICATION. In the absence of a statute to the contrary, oral evidence is competent to prove the publication of an ordinance.**5. ———: PASSAGE OF ORDINANCE: SUSPENSION OF RULES: PRESUMPTION.** Where the record of a town council recites that the rules were suspended upon the passage of an ordinance, the record will, in a collateral proceeding, be conclusively presumed to be correct, though it fails to show the number of votes cast for and against the proposition to suspend.*Appeal from Hardin District Court.*

THURSDAY, OCTOBER 18.

THE defendant was convicted upon an information filed with the mayor of plaintiff charging him with the violation of a town ordinance forbidding the sale of vinous, malt and intoxicating liquors. Upon an appeal to the district court, a like judgment was entered.

Huff & Pillsbury, for appellant.

No appearance for appellee.

BECK, J.—I. The information is in two counts, the first charging defendant with selling, contrary to a town ordinance, "intoxicating, malt, fermented and vinous liquors, to-wit: beer, porter ale, wine and mixed intoxicating liquors." The second count charges the sale of "spirituous, malt, fermented, intoxicating and mixed liquors, to-wit: beer, ale, wine, and mixed intoxicating liquors," contrary to the provisions of the ordinance. In the district court the defendant demurred on the grounds: First, the information charges a crime punishable by the laws of the state; second, each count is bad for duplicity, in that it charges more than one offense. The

demurrer was overruled, which is now complained of by defendant.

II. It is alleged that the information charges the selling of intoxicating liquors other than beer, ale and wine, which is an offense punishable under the law of the state. For the purposes of the case, let this position be admitted. But the information also charges the sale of beer, ale and wine, and the sale of these liquors may be punished by the town ordinance. This cannot be and is not denied. We have the case, then, of the charge of two offenses, or two classes of offenses, one of which is punishable under the town ordinance and the other is not. The allegations as to the offense not punishable under the information will be regarded as mere surplusage, just as though it had included a charge of treason or other felony. But this would not affect the charge of the offense within the jurisdiction of the town, and its judicial officer, the mayor.

III. It is insisted that both of the counts are bad for duplicity, in that each count charges more than one offense. So far as this objection is based upon the fact that the information charges the offense of selling spirituous liquors, which is punishable only under the statutes of the state, it is answered by the consideration above stated, namely, that the allegation of such charge is mere surplusage, and may be disregarded. So far as it is based upon the fact that it charges more than one sale of malt or vinous liquors, it is answered by the consideration that the town ordinance authorizes "any number of violations of the ordinance to be included in one complaint."

IV. It is insisted that the ordinance is void, for the reason that, besides prohibiting the sale of malt and vinous liquors, which the town has authority to do, it also prohibits the sale of other intoxicating liquors, which it has no power to do. But the ordinance will be supported and enforced so far as it is within the lawful authority of the town, and will be held for naught

1. CRIMINAL
law: information
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surplusage.

2. THE SAME.

3. CITIES and
towns: ordinance:
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The Town of Eldora v. Burlingame.

in so far as it attempts to exercise power not conferred by the state. Therefore, its provisions prohibiting the sale of beer, ale and wine will be held valid, and will be enforced. The ordinance was properly admitted in evidence.

V. Oral evidence was admitted against defendant's objection to prove that the ordinance under which the prosecution
 4. — : — : is had was published in a newspaper as required
 evidence of publication. by law. In the absence of a statute to the contrary, oral evidence is competent to establish the fact of publication. The ordinance, being found in the proper record of the town, in its form as published, was at least *prima facie* admissible. If the publication was disputed, the fact was properly established by oral testimony.

VI. The defendant offered oral evidence to prove that the
 5. PASSAGE OF ordinance : record of the council, showing the passage of the
 suspension of ordinance upon a motion suspending the rule
 rules : pre- requiring it to be read upon three different days,
 sumption. fails to establish the validity of the ordinance, for the reason that the rules were not suspended upon the vote of a competent number of councilmen. But the record recites that the rules were suspended, without showing the number of votes on the proposition, and in its support the law will conclusively presume, in a collateral action, that it is correct. See Dillon's Municipal Corporations, § 236. We have considered all questions discussed by counsel for defendant. The judgment of the district court is

AFFIRMED.

DONOVAN v. HAYES.

1. **Practice Before Referee; PRESERVING EVIDENCE.** This case was tried before a referee, and as it nowhere appears from the record that the evidence was preserved by bill of exceptions, or by any certificate of the referee, or that it was in any way identified, and as no errors are found in the conclusions of law made by the referee, the judgment of the court below upon the referee's report must be affirmed.

Appeal from Allamakee District Court.

THURSDAY, OCTOBER 18.

THIS is an action to recover damages for the alleged breach of covenants in a deed to certain land. The cause was referred to a referee for trial, and the referee reported in favor of the plaintiff. The report was approved by the court, and judgment was rendered thereon, and defendant appeals.

H. H. Stillwell, for appellant.

James O. Crosby, for appellee.

ROTHROCK, J.—Counsel for appellee makes the claim that the cause cannot be entertained in this court, because of certain defects appearing of record. Among them it is alleged that the abstract does not purport to contain all the evidence, and that what is set forth as the evidence is not in any way authenticated by a bill of exceptions, nor by a certificate of the referee to the evidence. An examination of the abstract shows that the point is well taken. It is true, it is recited in the abstract, in reference to the hearing before the referee, and immediately preceding what purports to be the evidence, that "the following is a correct statement of the proceedings had on such hearing, of the evidence introduced and objections made thereto, and correctly shows the rulings made on such objections," and the referee in his report states that "the entire proceedings, including evidence, objections,

Ryan v. Kennedy et al.

motions, and rulings before referee, were reduced to writing, and accompany this report." But it nowhere appears in the report before us that the evidence was preserved by bill of exceptions, or by any certificate of the referee, or that it was in any way identified. When the final judgment was entered, sixty days were taken to file a bill of exceptions, and it is recited that a bill of exceptions duly signed was filed on the fifteenth of July, 1880. But it nowhere appears that the evidence was incorporated in this bill of exceptions. We suppose it was not so incorporated, because the court could only know what the evidence was from a certificate of the referee, and it does not appear that there was such a certificate. We discover no error in the conclusions of law made by the referee, and as we do not have his rulings and the evidence presented to us, the judgment must be affirmed.

We regret that we cannot dispose of the case upon its merits. It is always more satisfactory to the court to dispose of cases in that way, but when questions affecting the record are presented, we cannot avoid passing upon them.

AFFIRMED.

RYAN V. KENNEDY ET AL.

1. **Highway: DEDICATION: FACTS CONSTITUTING.** Where a road supervisor, in opening a road, at the request of a land-owner deflected slightly from the line of the road as established, and the road thus laid out and opened was worked and traveled for fourteen years, *held* that there was a dedication on the part of the land-owner, and that the public acquired a right to have the road kept free from obstructions erected therein by him

Appeal from Jasper District Court.

THURSDAY, OCTOBER 18.

ACTION for an injunction to restrain the defendant, Kennedy, as road supervisor, from removing a fence from an

Ryan v. Kennedy et al.

alleged public highway. A temporary injunction was granted, and the same was afterward dissolved. From the order dissolving the injunction the plaintiff appeals.

Ryan Bros., for appellant.

Winslow & Wilson, for appellees.

ADAMS, J.—The evidence, we think, shows that the road in question was dedicated to the public about fourteen years prior to the commencement of the action, by one James Farley, who was the owner of the land at that time, and that the road has been worked and traveled as a public highway ever since. The facts appear to be substantially as follows: A road was duly established by the board of supervisors very near the line of the road as traveled. When the road supervisor proceeded to open the road that had been established, he followed the line of the road as established a part of the way, but, at the request of Farley, the land-owner, he deflected a little at one or two points. This request of Farley, and the action of the road supervisor in opening the road as requested, and of the public in traveling the road as opened, constitute the foundation of whatever right the public has outside of the line upon which the road was originally established. The plaintiff claims that this is insufficient, because it was not within the power of Farley and the road supervisor to change a road duly established. To this we have to say that it may be that such power is wanting, but that is not the question before us. We are not concerned to inquire whether the road as established ceased to exist when the rights of the public attached to the road as travelled. For the purposes of the opinion, it might be conceded that the road as established still exists. What we hold is, merely that the public acquired the rights as claimed by the defendants. We think that the injunction was properly dissolved.

AFFIRMED.

VOTAW V. CORWIN.

69	39
82	123

1. **Appeal to Supreme Court; LESS THAN \$100: CERTIFICATE.** On the appeal of cases involving less than \$100, the questions certified by the trial judge should be intelligible in and of themselves, and when they are not, and it is necessary to examine the whole record to ascertain what the questions are, the case will not be considered.

Appeal from Wright District Court.

THURSDAY, OCTOBER 18.

THIS is an action to recover part of the purchase price for a tract of land sold by the plaintiff to the defendant. There was a demurrer to the petition, which was sustained. Plaintiff appeals.

C. F. Peterson and J. H. Scales, for appellant.

Nagle & Weber, for appellee.

ROTHROCK, J.—The amount in controversy does not exceed one hundred dollars, and we have repeatedly determined, and rule 12 of this court requires, that the certificate provided for in this class of cases should set out and state the question of law which it is thought desirable should be decided by this court. The first question certified in this case is as follows: "Was the demurrer properly sustained?" The other questions are somewhat more specific, but none of them are intelligible in and of themselves, and in order to ascertain the meaning of the questions a full examination of the abstract is required. In some cases the claim has been made that the questions certified do not arise upon the record. In such cases we look into the record to determine that question, to the end that we may not be called upon to decide mere abstract questions. But if we are required to examine the whole record to determine what questions are certified, the rule requiring the certificate to set out the questions might as well

 State v. Reed.

be repealed. We are the more ready to make this disposition of the case, because the petition upon its face is a clear case of an attempt to recover upon a parol agreement, which adds to and varies the terms of a written cotemporaneous contract between the same parties, upon the same subject matter.

AFFIRMED.

68	40
81	49
62	40
84	86

STATE V. REED.

Criminal Law: ALIBI: MEASURE OF EVIDENCE. To establish an *alibi* it is not necessary that the jury should be fully satisfied of its truth. But the evidence of an *alibi* cannot avail unless it preponderates. See *State v. Hamilton*, 57 Iowa, 598.

2. ———: ———: NOT PROPERLY A DEFENSE. *Alibi* is not a *defense* within any accurate meaning of the word, but a mere fact shown in rebuttal of the state's evidence; and it does not, therefore, demand a specific instruction from the court.

Appeal from Sac District Court.

THURSDAY, OCTOBER 18.

THE defendant was convicted of entering, without breaking, a dwelling house in the night time, with intent to commit larceny, and was sentenced to the penitentiary for four years. From the judgment he appeals.

J. N. Davis and *B. A. Dolan*, for appellant.

Smith McPherson, Attorney-general, for the State.

ADAMS, J.—I. The prosecuting witness in this case is one Brady. The evidence shows very clearly that some one entered his house during the night, with intent to commit larceny. The doubt as to the defendant's guilt, if any, arises upon the question of identity. Both Brady and wife saw the person who entered the house, and

1. CRIMINAL
law: alibi:
measure of
evidence.

thought that they recognized the defendant as that person. On the other hand, the defendant introduced evidence tending to show that he was elsewhere on the night in question, and could not have committed the crime with which he was charged. As pertaining to this evidence, the defendant asked an instruction in these words: "As regards the defense of *alibi*, the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt, to entitle him to an acquittal. It is sufficient if the evidence on that point raises a reasonable doubt of his presence at the time and place of the crime charged. In other words, to establish an *alibi* it is not necessary that the jury should be fully satisfied of its truth." The court refused to give this instruction, and instructed as follows: "If there is any reasonable doubt of the defendant's guilt of the crime charged against him on the whole evidence, he is entitled to an acquittal."

The defendant, we think, has no reasonable ground of complaint because the court refused to instruct as asked. The instruction asked is not, we think, where taken altogether, as favorable to the defendant as the one given. It is, of course, true, that to establish an *alibi* it is not necessary that the jury should be fully satisfied of its truth. It would be sufficient if the evidence of an *alibi* preponderates. The doubt is as to whether even that amount is necessary to justify an acquittal. Chief Justice Day and myself think that the defendant is entitled to an acquittal if the evidence of an *alibi* is sufficient to raise a reasonable doubt of guilt; and I understand the court below as substantially so ruling. I think it would have been impossible for the jury, following the instruction given, to have found a verdict against the defendant, if they had had a reasonable doubt as to whether the defendant was present at the time and place of the crime charged. The majority of the court think that evidence of an *alibi* cannot avail unless it preponderates. *State v. Hamilton*, 57 Iowa, 598. That part of the instruction asked which is most favorable to the defendant, the majority of the court regard as

incorrect. As to the other part, the defendant cannot properly complain, because the court manifestly went farther in his favor than that part of the instruction asked did. The defendant feels that injustice was done him, because the court did not specifically call the attention of the jury to what he calls ^{2. —: —: his defense of an *alibi*. He says "that instructions not properly a defense.} should be given upon each material *issue*," and cites in support of the proposition a large number of authorities. The writer does not regard *alibi* as a *defense* within any accurate meaning of the word, but as a mere *fact* shown in rebuttal of the state's evidence. But if it be regarded as a defense, and calling for a specific instruction, the court below could not, under the ruling of the majority of this court in *State v. Hamilton*, above cited, have given the instruction asked.

II. The only other point made by the defendant is that the verdict is not supported by the evidence. While we do not regard it as certain that there has not been a mistake of identity, we have to say that there is a decided conflict of evidence, and it is not our province to interfere. The judgment must be

AFFIRMED.

62 42
131 101

THE FIRST NATIONAL BANK OF NEVADA V. BRYAN ET AL.

1. **Pleading and practice: ANSWER AIDED BY EVIDENCE.** Where the facts set up in the answer, considered in the light of evidence admitted without objection, were sufficient to constitute the defense of duress, such defense will be considered as having been made.
2. **Duress: FACTS CONSTITUTING.** Where a woman's husband was illegally restrained in the office of an attorney, who represented to her that unless she executed a mortgage on her homestead her husband would be arrested on a charge of felony, and she executed the mortgage solely to avoid his arrest, *held* that the mortgage was obtained under duress, and was void. See *Green v. Scranage*, 19 Iowa, 461.

8. ———: MORTGAGE OBTAINED BY: INNOCENT HOLDER. While it has been held by this court that a *bona fide* indorsee before maturity of a note secured by a mortgage, without notice of infirmities, takes the mortgage, as he takes the note, free from the defenses to which it is subject in the hands of the mortgagee, (see cases cited,) yet this doctrine will not be extended to a case like this, where the mortgage was upon the homestead of a woman who did not sign the note, and whose signature to the mortgage was secured by duress.

Appeal from Store District Court.

THURSDAY, OCTOBER 18.

THE plaintiff, as the indorsee before maturity of a negotiable promissory note for \$645, executed by Solon Bryan to the order of P. F. Nelson, brings this action to recover the amount of said note, and to foreclose a mortgage to secure the same, executed by Mary E. Bryan and Solon Bryan upon their homestead. The court found that both the note and mortgage were obtained by duress, and that the plaintiff, as an innocent holder of the note for value before maturity, was entitled to recover upon the note, but was not entitled to a foreclosure of the mortgage. The plaintiff appeals.

Dyer and Fitchpatrick, for appellant.

C. H. Balliett and S. F. Balliett, for appellee.

DAY, CH., J.—I. The appellant insists that the answer does not set up that the note and mortgage were obtained by duress.

1. PLEADING and practice: answer added by evidence. The appellees filed an amended abstract, setting forth that the defendant, under leave of court, filed an amended answer to meet the evidence, formally setting up that the note and mortgage were made under duress. The appellant denies that such amendment was filed. We have examined the transcript, and do not find any reference to such amendment. However, we regard this question as immaterial. The original answer sets up facts sufficient to present the defense of duress, in view of the fact that the evidence was admitted without objection.

II. It appears from the evidence that Solon Bryan had a contract for erecting a school house in Harlan; that he purchased the bricks therefor from P. F. Nelson, and that, to secure \$945 of the purchase price, he executed a chattel mortgage upon one hundred and fifty thousand of the bricks; that he failed in the execution of his contract, and turned over his contract, together with the bricks mortgaged to Nelson, to the sureties on his bond for the performance of his contract; and that they assumed and completed the erection of the building. It further appears that the sureties had knowledge of the existence of the mortgage when they took the assignment of the contract. The attorney of Nelson locked Solon Bryan in his office, and demanded a mortgage to secure the balance due on the bricks, which was then \$645, and represented that unless he executed the mortgage he was liable to prosecution, and would probably be prosecuted for selling and disposing of mortgaged property. The attorney also procured a letter to Mary E. Bryan from her husband for a description of the homestead property. She at first refused to furnish a description without seeing her husband. The attorney of Nelson told her that she could not see her husband, that he was locked up in his office and could not come out; that Bryan had sold mortgaged property; and that they had a warrant for his arrest, and that if she would give a description of the homestead for a mortgage it would save his arrest; that it was a penitentiary offense to sell mortgaged property, and that if she did not give the description they would send him to the penitentiary. Mary E. Bryan went to the office of the attorney and was admitted, and her husband then told her that they had got him into some trouble, and that by giving a mortgage upon the homestead for a short time it would help him out. It seems that the note and mortgage were executed at that time and place. Mary E. Bryan testifies that she was induced to sign the mortgage by what the attorney had said, that it would save Mr. Bryan's arrest, and that they would straighten it up before the mort-

gage was due. We are satisfied that the execution of the mortgage was not the voluntary act of Mary E. Bryan, and that it was obtained by duress, under the doctrine of *Green* and *Densmore v. Scrannage*, 19 Iowa, 461.

III. The most important question in the case is as to whether the plaintiff, an innocent holder of the note before maturity, is entitled to a foreclosure of the mortgage. It has been held by this court that a *bona fide* innocent holder of a mortgage obtained by duress before maturity of a note secured by a mortgage, without notice of infirmities, takes the mortgage as he takes the note, free from the defenses to which it is subject in the hands of the mortgagee. *Preston, Kean & Co., v. Morris, Case & Co.*, 42 Iowa, 549; *The Farmers' National Bank of Salem v. Fletcher*, 44 Id., 252; *Clasey v. Sigg et al.*, 51 Id., 371. In all of these cases the mortgages were voluntarily executed upon the property of the persons who executed the notes. Beyond the doctrine of these cases we do not feel justified in going, in the application to mortgages of the principles which pertain to negotiable paper. In *Burbank v. Warnich*, 52 Iowa, 493, when no note was delivered with the mortgage to the mortgagee, it was held that an assignee of the mortgage took it subject to all equities between the original parties. In *Tabor v. Foy*, 56 Iowa, 539, where the note accompanying the mortgage was forged, it was held that the assignee of the mortgage took it subject to all defenses existing against it in the hands of the mortgagee, notwithstanding the admission of the mortgagor that she signed the mortgage. This case differs from all those which have heretofore been determined in this court. In this case the mortgaged property belongs to Mary E. Bryan, who did not sign the note, and the mortgaged property is her homestead. Her execution of the mortgage was procured by duress, and was not her free and voluntary act. Section 1990 of the Code requires the concurrence of both the husband and wife to a conveyance or incumbrance of the homestead. Mary E. Bryan did not legally concur in this conveyance. As between

RITCHIE v. McDUFFIE et al.

her and the mortgagee, the mortgage was void. Mortgages are not intended to circulate as commercial paper, and we do not think that the interests of commerce require that the principles applicable to negotiable paper shall be extended to a mortgage executed under such circumstances as the mortgage in question. The judgment of the court below is

AFFIRMED.

RITCHIE v. McDUFFIE ET AL.

1. Conveyance of Encumbered Land: LIABILITY OF GRANTEE.

Where land encumbered by a mortgage and taxes is conveyed, and there is no agreement on the part of the grantee to pay such encumbrances, he is not personally holden for them, though the land is holden.

2. Mortgage to School Fund: SUBSEQUENT TAXES: PRIORITY OF LIEN.

Where land mortgaged to the school fund was afterwards sold for taxes subsequently accruing, the mortgage lien was superior to that of the holder of the tax sale certificate, and where such holder was made a party to an action to foreclose the mortgage, he had a right, under the statute, to redeem from the foreclosure sale, but, having failed so to do, his interest ceased, and the execution to him of a tax deed was properly enjoined.

Appeal from Greene Circuit Court.

THURSDAY, OCTOBER 18.

ACTION in equity, the object of which was to enjoin the execution of a tax deed for certain real estate to the defendant. The injunction was made perpetual, and defendants appeal.

C. C. Cole, for appellants.

C. H. Jackson, for appellee.

SEEVERS, J.—The case was submitted to the circuit court and to this court on an agreed statement of facts, the ma-

terial portion of which is as follows: The real estate in controversy in 1874 was owned by one Marmon, and he executed a mortgage to the school fund. Marmon conveyed to Reynolds, and he to Smith, in November, 1875. Both Reynolds and Smith agreed to pay the mortgage. In July, 1877, Smith executed an agreement, whereby he bound himself to convey by warrantee deed one undivided half of the premises to Jackson, upon the happening of a condition.

Jackson became entitled to a deed in December, 1877, but it was not executed. In February, 1880, Smith conveyed all his interest to Jackson by quit claim deed.

In 1879, the school fund mortgage was foreclosed. To this action McDuffie was made a party, and a decree was entered declaring the mortgage to be superior to any lien held by McDuffie. In July thereafter, the premises were sold by the sheriff under the decree, and Greene county became the purchaser. A certificate of purchase was issued to the county. No redemption from such sale was made by McDuffie or any one else. On the 9th day of July, 1880, Greene county, for a valuable consideration, assigned the certificate of purchase to Jackson, and the premises were conveyed to him by the sheriff. Afterward, Jackson conveyed by warranty deed to the plaintiff. The land was sold in 1876 and 1877, for the taxes due and delinquent for the years 1875 and 1876, and McDuffie purchased the same at such sale, and now claims that he is entitled to a tax deed to the property in controversy.

Counsel for the appellants insist that the mortgagor to the school fund became bound to pay the taxes, and also to pay the mortgage. This may well be conceded. It is further insisted that the "grantees of the mortgagor acquired the property with full knowledge of the conditions imposed upon their grantor; they became privies in estate, and substituted in the place of their grantors, and were therefore severally liable for the payment of the taxes due on said land, as well as the mortgage thereon." In support of this proposition, Code, § 857, and *Porter v. Lafferty*, 33 Iowa, 254, are cited.

Ritchie v. McDuffie et al.

That Reynolds and Smith were bound to pay the mortgage is true, because they agreed so to do. Smith, it will be assumed, was bound to pay the taxes for 1875 and 1876, because he owned the premises at the time they accrued. But Jackson never agreed to pay the mortgage or taxes, and we are unable to see that he was under any legal obligation to do so. No obligation is cast on him to pay the taxes by the section of the Code above cited, and, as we understand, *Porter v. Lafferty*, above cited, is, as to this branch of the case, an authority against the appellants.

The real point in this case may be briefly stated. Smith was under obligation to pay both the mortgage and the taxes. He conveyed to Jackson, and appellant claims that this fact alone and of itself makes Jackson personally liable for, or casts on him an obligation to pay, the taxes. No authority has been cited which so holds, and we do not think such is the law. The land ordinarily would, in Jackson's hands, be so liable, but no personal obligation would be cast on him. But the mortgage to the school fund was the superior lien, and had been so declared by the court. McDuffie could have redeemed from such lien, but he failed to do so.

There being no legal obligation on Jackson to pay the taxes, he could well take from the county an assignment of the certificate of purchase, receive a conveyance from the sheriff, and become possessed of just the same rights and equities as the county would have had if the conveyance had been executed to it. The plaintiff cannot be liable if Jackson is not, and he holds the land free from the claimed lien of McDuffie.

AFFIRMED.

NASH & PHELPS v. THE CHICAGO, MILWAUKEE & ST. PAUL
R'Y Co., ET AL.

1. **Mechanic's Lien: TIME OF FILING: WORK ON RAILROAD UNDER SUBCONTRACTOR.** Where work was done upon a railroad under a subcontractor in July and August, 1881, and the notice required by Code, § 2131, of the filing of the claim for the lien was given October 31, 1881, and, prior to the giving of the notice, the subcontractor had been paid in full, in accordance with the contract for the work, after its completion, *held* that the lien could not be enforced against the railroad.
2. **Assignment of railroad "Time Checks": CONTRACTOR NOT BOUND BY.** This action was brought against the principal contractors upon an assignment of certain "time checks" signed by the subcontractor; but these time checks not purporting to be an obligation of the principal contractors, judgment against them was properly refused.

Appeal from Marshall District Court.

THURSDAY, OCTOBER 18.

ACTION to recover for work done in building a railroad, and to enforce a mechanic's lien therefor. A trial was had without a jury, and judgment was rendered for defendants. Plaintiffs appeal. The facts of the case are fully stated in the opinion.

Brown & Carney, for appellants.

J. H. Bradley, for appellee.

BECK, J.—I. The petition alleges that certain laborers performed work in constructing the railroad, under contract with one Ryan, for which no payment has been made; that claims for a lien were duly filed, and notice thereof served upon the railroad company, and that the claims have all been assigned to plaintiffs. Judgment is prayed against Langdon, Bishop & Co., contractors, and a lien is claimed against the railroad. An amended petition shows that the contractors became bound to pay the claims by reason of promises and

Nash & Phelps v. The Chicago, Milwaukee & St. Paul R'y Co. et al.

representations made by them, and under provisions of their contract with the railroad company. The answer, admitting the services rendered by plaintiff's assignees, and that Langdon, Bishop & Co. were contractors, and Ryan was a sub-contractor, denies other allegations of the petition. In the view we take of the case, a more particular statement of the pleadings is unnecessary.

II. The work was done by plaintiff's assignors in July and August, 1881; the notice required by the statute, (Code, § 2131,) of the filing of the claim for the lien was given October, 31, 1881, and prior to the giving of the notice the sub-contractor, Ryan, had been paid in full, in accordance with the contract for the work, after its completion. No lien can, therefore, be enforced against the railroad for the claims of plaintiff's assignors. *Sandval v. Ford*, 55 Iowa, 461; *Robinson & Atherton v. The State Ins. Co.*, Id., 489.

III. We are required to determine whether plaintiffs are entitled to a judgment against Langdon, Bishop & Co. We think they are not, for the reason that they fail to prove that the claim was assigned and transferred to them. The assignment was made by the persons performing the labor executing a written instrument in the following language:

"For value received we hereby assign to Nash & Phelps our accounts against the Chicago, Milwaukee & St. Paul R. R. Co., for work done on construction of a railroad bed for said railroad company, and all our right, title and interest in certain mechanic's liens filed in the office of the clerk of district court of Marshall county, Iowa, by us, against said railroad company. Audubon, Iowa, Nov. 18, 1881."

This instrument transfers an account against the railroad company, and a claim for mechanic's lien. It transfers no claim against Langdon, Bishop & Co.

The sub-contractor gave to each of plaintiff's assignees a memorandum in the following form:

1. MECHANIC'S
lien: time of
filing: work
on railroad
under subcon-
tractor.

1. ASSIGN-
MENT of rail-
road time
checks: con-
tractor not
bound by.

Nash & Phelps v. The Chicago, Milwaukee & St. Paul R'y Co. et al.

"\$60.66

TIME CHECK.

"Marion Extension, C. M. & St. P. R. R.

"*To Langdon, Bishop & Co., Contractors,*

"Jake Waltenberg has worked 21 1-2 days in the month

of July with team, at \$3.50 per day - - - \$78.92

"To account with Matt. Ryan - - - - - 18.26

"Balance due - - - - - \$60.66

"MATT. RYAN, Sub-Contractor.

"Dated Aug. 11, 1881."

These "time checks" were delivered to plaintiffs, the name of the respective payees being indorsed upon each. If it be conceded that this indorsement constituted an assignment, it transferred no claims against Langdon, Bishop & Co. The instrument is evidence of indebtedness of Ryan to the payee, or of the indebtedness of the railroad company to Langdon, Bishop & Co. It is not a claim, or evidence of a claim, against the parties last mentioned. Its assignment does not operate to transfer to plaintiffs a claim upon them. There is no other evidence of the transfer of these claims to plaintiffs relied upon except these instruments. We therefore conclude that plaintiffs failed to establish any interest in the claims sued upon. As we understand the record, the court below upon this ground dismissed plaintiffs' petition. The decision was correct, and must be

AFFIRMED.

RUSIE V. JAMESON ET AL.

1. **Fraudulent Conveyance: INADEQUACY OF PRICE AS EVIDENCE.**
A slight inadequacy of consideration given for land is not sufficient to evince a fraudulent intent.
2. ———: **EVIDENCE NOT ESTABLISHING.** The evidence in this case considered and *held* insufficient to prove that a conveyance from a son-in-law to his father-in-law was fraudulent.

Appeal from Marshall Circuit Court.

THURSDAY, OCTOBER 18.

ACTION in equity to set aside a conveyance of real estate, on the ground that the same was made to hinder and delay creditors. Judgment for the defendants, and plaintiff appeals.

Brown & Carney, for appellant.

Binford & Snelling, for appellees.

SEEVERS, J.—I. The plaintiff is the holder of a judgment against Milo Somers, who is the son-in-law of the defendant, Jameson. Somers was the owner of

1. **FRAUDULENT** conveyance: inadequacy of price as evidence of.

one hundred and sixty acres of land, which was mortgaged to Jameson to secure an indebtedness, including interest, amounting to about \$3,350.

There was another mortgage to Bisbee & Hilty, to secure them against liability on a guardian's bond which they had signed as surities of Somers. The defendant purchased the real estate. The same was conveyed to him in payment of, and was to cancel, the indebtedness due him, and pay the amount due on the Bisbee & Hilty mortgage. The amount due on the mortgage was between \$800 and \$900, and the same was paid by the defendant in accordance with his contract of purchase. So that the defendant in fact gave for the real estate, as above stated, \$4,200, or a little upwards of

\$26 per acre, and, besides this, paid taxes amounting to \$40. The purchase was made in March, 1880. The trial was in June, 1881. The plaintiff and two other persons testified that in their judgment the land was worth, in 1880, \$30 per acre, or \$4,800. It is insisted that the price paid is inadequate, and evidence of fraud. But we do not think this is so. Giving all possible weight to the evidence, the inadequacy is not very great, and it is not sufficient, we think, to evince a fraudulent purpose.

II. The defendant was informed, and he had knowledge, we think, that Somers was insolvent. As to the validity of the mortgages no question is made. They could have been foreclosed, and the defendant could have purchased at the sale, and thus have obtained a title that could not have been successfully assailed. This would, however, have involved some considerable expense. Instead of incurring, or encumbering the property with, this expense, the defendant made the purchase. If he had obtained title by foreclosure, he could have given it away, if he saw proper, and the plaintiff would have no just ground of complaint. The same result must follow the purchase, unless a fraudulent intent in making it clearly appears; for under the circumstances it is difficult to infer such an intent. Because of his sympathy for his daughter, the defendant made the purchase, and permitted Somers and his family to remain on the farm and receive a portion or all of the rents and profits. We think that the evidence shows that the defendant gave his daughter a small amount of money in addition to the proceeds of the farm. The defendant had a perfect right to secure his own indebtedness in the manner he did, and, conceding that it was his intention to purchase the land and give his daughter and her family the rents and profits of the real estate, he had the right to do so. He could, if he saw proper, have given her the farm, and it would not have been a fraudulent transaction, even if he had so determined prior to purchasing it. *Smith v. Riggs*, 56 Iowa, 488.

AFFIRMED.

STATE V. PHIPPEN.

1. **Perjury: OATH BEFORE TOWNSHIP ASSESSOR: ALLEGATION OF TIME IN INDICTMENT.** A person cannot be convicted of perjury for taking a false oath before one not empowered by law to administer oaths; and as a township assessor is not authorized to enter upon his duties before the third Monday of January after his election, one who, before such assessor, falsely swears to an assessment of his property, prior to that time, does not thereby commit legal perjury. In such case the allegation of time in the indictment becomes material, and renders the indictment bad.

Appeal from Henry District Court.

THURSDAY, OCTOBER 18.

THE defendant was convicted of the crime of perjury. The facts involved in the question of law ruled by this court appear in the opinion.

Wright, Cummings & Wright, and Palmer & Palmer,
for appellant.

Smith McPherson, Attorney-general, for the State.

BECK, J.—I. Numerous questions arising upon objections to the indictment, and upon the instructions given and refused, are discussed by defendant's counsel. We find it necessary to consider but one objection to the validity of the judgment of conviction, which meets us at the threshold of the case, and prevents escape from the reversal of the judgment of the court below.

The indictment charges defendant with the crime of perjury committed in falsely swearing to the assessment of property for taxation. It alleges that the perjury was committed on the 15th day of January, 1880, and that the oath was administered by the assessor of the township wherein the property was assessed. The defendant, by demurrer to the indictment, and by motions to set aside the verdict, and for a new trial, and in arrest of judgment, objected to the indict-

ment on the ground, among others, that it shows upon its face that the assessor had no lawful authority to administer the oath at the time the offense is alleged to have been committed. The objection is renewed in this court. In our opinion it should have been sustained by the district court.

II. Township assessors are elected annually upon the second Tuesday of October of each year, except that, when a president is elected, the election is held upon the Tuesday next after the first Monday of November. Code, §§ 573, 591. The township assessors cannot enter upon the duties of their offices in the assessment of property, and they are charged with no others, until the third Monday of January next after the election. Code, § 822.

The indictment alleges that the assessment was made and the oath was administered to defendant on the 15th day of January, which was before the law authorized the assessor to enter upon the discharge of his duty, the third Monday falling, the year the assessment was made, upon the 19th day of the month. Upon that day the assessor had no lawful authority to perform any official act. He was not clothed with authority to make assessments or to administer oaths. His acts were those of one having no authority.

III. It cannot be claimed that a person may be convicted of perjury for taking a false oath before one not empowered by law to administer oaths. We will not be expected to cite cases upon this point. And it is equally well settled that an indictment for perjury is bad which alleges that the oath was administered by one not clothed with authority to administer it. The indictment in this case, in alleging that the oath was taken and the assessment was made on a day before the assessor was authorized by statute to enter upon the discharge of his duty, shows absence of authority of the assessor to administer the oath.

IV. The allegation of the day upon which the offense was committed is not usually material in indictments. But in an indictment for perjury it is material to show that the oath

was lawfully administered. Certainly, if the indictment shows that the oath was not lawfully administered, it is bad, and the defect is fatal. The allegation of the day when the assessment was made and the oath administered, is, in this case, something more than an averment as to the time of the offense. It is an allegation showing absolute want of authority of the assessor to administer the oath and make the assessment.

An indictment alleging facts that do not constitute a crime, cannot be supported by proof of other facts which are punishable by law. So an indictment for perjury, alleging that the oath was administered by a person not authorized by law so to do, cannot be supported by proof that the accused was sworn by one authorized to administer oaths. This is, in effect, the precise case before us. The indictment alleges that defendant was sworn by the assessor at a time when he had no authority to administer oaths. It cannot be supported by proof that the oath was subsequently administered, for the simple reason that it charges no indictable offense. The want of authority of the assessor to administer the oath at the time alleged in the indictment, takes from the false swearing the quality which renders it punishable by the law. It may, notwithstanding, be a moral perjury, but with that we have nothing to do.

We reach the conclusion that the district court erred in overruling the demurrer to the indictment and the motion to set aside the verdict and in arrest of judgment.

REVERSED.

Marsel, by next friend, v. Bowman.

MARSEL, BY NEXT FRIEND, v. BOWMAN.

62	57
111	579
62	57
1143	51

1. **Assignment of Error: TOO INDEFINITE.** Where a motion for a new trial was based on several grounds, and it is assigned as error simply that the court overruled the motion, this is too indefinite, and must be disregarded.
2. **Negligence: RESTRAINT OF VICIOUS DOG: OWNER OR BAILEE.** One who has charge of a vicious dog, whether as owner or bailee, knowing him to be vicious, must restrain him, and if he fails so to do he will be liable in damages to any person injured thereby.

Appeal from Marshall Circuit Court.

FRIDAY, OCTOBER 19.

THE petition states that defendant is the owner of a vicious dog, "which was in the habit of biting children and other persons without cause, and defendant, well knowing his vicious and ferocious habit, and that he had repeatedly bitten children and other persons, wrongfully and negligently permitted him to run at large, and, while so, he bit the plaintiffs legs and ankles," to her great damage. Trial by jury, verdict and judgment for plaintiff for \$365. The defendant appeals.

J. H. Bradley, for appellant.

Sutton & Childs, for appellee.

SEEVERS, J.—I. It is assigned as error that the court erred in overruling a motion for a new trial. There are five or more distinct grounds stated in the motion for a new trial. This assignment of error is too general, indefinite, and not as specific as the statute requires. It must, therefore, be disregarded. *Reilly v. Ringland*, 44 Iowa, 423.

II. The only other errors assigned challenge the correctness of the instructions. The evidence showed that the dog had bitten several persons, but there was no evidence that

Marsel, by next friend, v. Bowman.

plaintiff had knowledge thereof, except in a single instance. The defendant himself testified that he knew the dog had bitten a girl by the name of Brace

The court instructed the jury on the theory that, if the dog was vicious, and the defendant knew of such fact, it was his duty to restrain him, and if he failed to do so the plaintiff was entitled to recover.

The instruction is correct. *Popplewell v. Pierce*, 10 Cush., 509. A single instance of the dog having bitten a person is sufficient to charge the plaintiff with knowledge of the vicious nature and habits of the dog. *Kittredge v. Elliott*, 16 N. H., 79. The fact that the plaintiff was bitten, as alleged in the petition, was not and could not be controverted. Upon the undisputed evidence, under the instructions, the plaintiff was entitled to recover. It is wholly immaterial, therefore whether the plaintiff negligently permitted the dog to be at large, knowing his vicious nature. The plaintiff was absolutely bound to restrain him.

In the fifth paragraph of the charge, the court quoted the statute which makes the defendant absolutely liable, it is said, and that, therefore, the court made the right to recover depend upon two theories—one of absolute liability, and the other of qualified liability, depending on the defendant's knowledge of the vicious habits of the dog; and it is insisted that this was prejudicial error. But we think that this is not so. The defendant, as we have seen, under his own evidence, was liable, for he had knowledge that the dog was vicious, and this fact fixed his liability. There was not, therefore, any error in giving the fifth instruction.

The defendant had given the dog to another person who had not yet taken him away. It is urged that the defendant was a bailee only, and not, therefore, liable. "A person having in charge a dangerous animal, known to be such, is certainly responsible for its safe keeping, so far as the public is concerned, as much as if he was the owner." *Frammell v. Little et al.*, 16 Ind., 251.

Rawson & Rice v. Spangler.

Although no such error is sufficiently assigned, we deem it proper to say, as the question has been discussed by counsel, that the damages are not in our opinion excessive.

AFFIRMED.

RAWSON & RICE V. SPANGLER.

1. **Husband and Wife: AGENCY OF WIFE WHEN ABANDONED.** Where a wife was abandoned by her husband, with five small children to support, and with but little money and means of subsistence, *held*, (1) that she had authority at common law to sell a cow left by the husband, which was vicious, and of no use in supporting the family, for the purpose of procuring family supplies; (2) that the title to the cow conveyed by such sale could not be disputed by an attaching creditor of the husband, even though the husband intended that the cow should be given to such creditor to pay his debt; (3) that the wife was not required to delay the sale of the cow until her stock of money and provisions was exhausted; (4) that § 2207 of the Code was not designed to affect the wife's agency at common law.

Appeal from Fayette Circuit Court.

FRIDAY, OCTOBER 19.

ACTION to replevy a cow and calf. The property, in March, 1881, belonged to one Perkins. The plaintiffs claim that they acquired title to the property by purchase from Perkins' wife. After the alleged purchase, the defendant, as a creditor of Perkins, attached the same as Perkins' property. The plaintiffs brought this action to recover possession. There was a trial to the court, and judgment was rendered for the plaintiffs. The defendant appeals.

Lake & Harmon and Ainsworth & Hobson, for appellant.

Hoyt & Hancock and John Hutchins, for appellee.

ADAMS, J.—The court found that just prior to the alleged sale to the plaintiffs Perkins absconded, leaving his wife and

five small children in needy and destitute circumstances, and leaving the cow and calf with his family; that at the time of the alleged sale, also, the family were in needy and destitute circumstances, and that the sale of the property was necessary for the support of the family. As a matter of law, the court held that the wife had the authority to sell and convey a good title.

The defendant insists that the finding that Perkins left his family in needy and destitute circumstances is not supported by the evidence. But in our opinion it is. Mrs. Perkins testified that the children were of the ages of 2, 4, 6, 8 and 11 years, respectively; that she and the children were left in a poor condition for supporting themselves; that she had only about three dollars, five shoats, five or six bushels of wheat, a little flour, sugar and coffee, and a little pork; and that she had no other means of support. She also testified that the children had not a great deal of clothing.

Now, while it does not appear that all the food above mentioned had been consumed at the time of the sale of the property, and it does not appear that the children were suffering for clothing, the stock of food and clothing appears to have been small; and if Mrs. Perkins had no way of providing for her family, as we think the evidence shows, but by resorting to a sale, she was not, so far as the question of need and destitution was concerned, bound to wait until destitution had become complete. If she was to sell at all, it was proper for her to avail herself of the opportunity to sell when it was offered. One fact not found by the court was proved by undisputed evidence, and that is, that the cow was vicious, that Mrs. Perkins was unable to milk her, and regarded her as dangerous to the children.

We come, then, to the question whether, the circumstances being such as above set forth, Mrs. Perkins could be deemed to have authority to sell.

The wife's implied agency to act for her husband differs under different circumstances. She may ordinarily contract

for domestic supplies, and, if abandoned by her husband without her fault, she may always pledge his credit for necessities. If left by him in the management of his business, she may make the contracts reasonably incident to its management:

In the case at bar, the wife was left by her husband to provide for the family as best she could, out of such means of support as they had. One of the means of support was the cow, which was not useful to her, because she was vicious. We think it clear that, under the circumstances, she had implied authority to sell her.

In this connection we ought, perhaps, to say that the defendant complains of the exclusion of certain evidence, to-wit, the deposition of Perkins, in which he stated that he intended that the cow should be given to the defendant in payment of his debt. But it is not shown that his wife or the plaintiffs were aware of his intention. She was, according to the view which we have taken, apparently clothed with the power to sell the cow, and Perkins' secret intention would not be sufficient to invalidate the sale.

The defendant relies upon section 2207 of the Code, as excluding such power by implication. The section provides that, where a husband abandons his wife, and is absent for a year, without having provided for the support of his family, she may apply to the district or circuit court, which shall authorize her "to manage, control, sell and encumber the property of the husband for the support of the family, and for the purpose of paying debts."

The authority contemplated by the provision is evidently somewhat broader than that which could be deemed to arise merely by implication. It includes, evidently, the power to sell or mortgage real estate. The provision, too, is useful for the purpose of removing all doubt of the wife's power from the minds of those with whom she may have occasion to deal. It was not designed, we think, to affect any common law rule of agency.

In our opinion, the judgment of the circuit court must be

AFFIRMED.

THE DISTRICT TOWNSHIP OF JASPER V. THE DISTRICT TOWNSHIP
OF WHEATLAND.

1. **Statute of Limitations: EXPRESS TRUST.** Where a party takes possession of money and holds it in the discharge of an express trust, he cannot set up the statute of limitations to shield him from liability for the improper discharge of the trust. But by the facts of this case (see opinion) no trust was created.
2. **School District: SUBDIVISION OF: APPORTIONMENT OF ASSETS: RESULTING TRUST.** When a school district was subdivided, and upon apportionment of the assets it was agreed that certain taxes yet to be collected from territory not included in the plaintiff should be paid, when collected, to the plaintiff, there was no legal difficulty in plaintiff's receiving such payment; and the fact that it did not, and that the money was paid to the district formed out of the territory from which the taxes were collected, did not make the latter district in any sense the trustee of the former.

Appeal from Carroll District Court.

FRIDAY, OCTOBER 19.

THE questions presented in this case pertain to the sufficiency of the plaintiff's petition. The court below sustained a motion to strike out a part, and afterward sustained a demurrer to the remainder. The plaintiff elected to stand upon its petition, and judgment was rendered for the defendant. The plaintiff appeals.

M. W. Beach and *C. O. Cole*, for appellant.

J. E. Griffith and *O. H. Manning*, for appellee.

ADAMS, J.—The action was commenced on the 9th day of April, 1881. The cause of action accrued more than five years prior to that time. The court below held that it was barred by the statute of limitations. The plaintiff insists that it does not appear that the action was barred, taking the petition as it stood before the motion to strike out a part of it was sustained, and that the court erred in striking out such

part. The liability of the defendant is alleged to consist in the fact that it drew from the county treasurer of Carroll county certain money which belonged to the plaintiff. The principal point controverted in argument is as to whether the petition showed that the defendant, in drawing and holding the money, did so in the discharge of an express trust. The parties are agreed in respect to the rule of law that, where a party takes possession of money and holds it in the discharge of an express trust, he cannot be allowed to set up the statute of limitations to shield himself from liability for the improper discharge of the trust. The plaintiff undertook to so frame its petition as to set out such trust, but the court below thought that it did not succeed. It is not necessary to go into a full statement as to how the rights of these parties became complicated, and how it happened that the county treasurer paid money to the defendant which belonged to the plaintiff. It is sufficient to say that, at one time, the district township of Jasper embraced a large territory. Out of that territory other district townships have been carved, and one of the subdivisions has been subdivided. The first subdivision took place in 1868, when the district townships of Sheridan and Glidden were carved out of the territory constituting the original township of Jasper. Afterward the district township of Kniest was carved out of the district township of Sheridan, and the defendant, the district township of Wheatland, was carved out of the district township of Kniest. When the first subdivision took place, the respective boards of Jasper, Sheridan and Glidden made a division of the assets and liabilities, and the assets included certain taxes thereafter to be collected, and, among them, the taxes constituting the money now in controversy. By that division, this money was to be paid to the district township of Jasper. But considerable time elapsed, and a misconception arose in regard to what the division embraced, and the result was that this money, which should have been paid to the district township of Jasper, was paid to the district town-

The District Township of Jasper v. The District Township of Wheatland.

ship of Wheatland, being money collected as taxes, from that territory; and there the matter rested for over six years.

We have deemed this statement necessary to render more fully intelligible the plaintiff's averments contained in that part of the petition which was stricken out. The plaintiff relies upon these averments as showing an express trust. After setting out the contract of division made between the respective boards of Jasper, Sheridan and Glidden, the plaintiff averred: "That, under and by virtue of said contract, the district township of Sheridan, as originally constituted, became the resulting trustee of the plaintiff herein, for the purpose of receiving from the county treasurer the moneys collected from lands lying within its territory, as then constituted, for taxes levied prior to its organization, and paying the same over to the plaintiff herein under said agreement; that, when the district township of Kniest was carved out of the territory of said district township of Sheridan, it assumed said trust, so far as lands chargeable with said taxes were lying within its territory, and that, when the defendant herein was carved out of the territory of the district township Kniest, as aforesaid, it assumed said trust, so far as lands lying within its territory were chargeable with said taxes or assets of the said original district township of Jasper."

It will be observed that the averment is that the district township of Sheridan became a *resulting trustee*, but it is insisted that, notwithstanding it became such trustee, the trust shown is an express trust. But in our opinion no trust of any kind is shown. The plaintiff's position, that the district township of Sheridan was made a trustee, is based upon the theory that it alone could draw from the county treasurer the taxes collected in its territory, and that it must, therefore, have been contemplated that it should draw the taxes and pay the same to the plaintiff, under the contract of division. But these taxes, even while uncollected, constituted a part of the assets of the original district township of Jasper, and not only that, but the contract of division expressly provided

Hardy v. Moore.

that the district township of Jasper should draw them. Nor do we think that there was any legal difficulty in carrying out this contract according to its letter. When, therefore, the plaintiff averred that "under and by virtue of said contract" the district township of Sheridan became a trustee for receiving the money, it not only avers a mere conclusion, but one which appears from the petition itself to be wrong. Now, if no trust was created so far as the district township of Sheridan was concerned, then there was no trust which the defendant could assume, and the plaintiff's averment, that the defendant "assumed said trust," goes for nothing. We think that the petition taken altogether not only failed to show a trust, but negatived such idea, and it follows that the plaintiff's cause of action appeared from the petition to be barred.

AFFIRMED.

HARDY V. MOORE.

1. **Practice in Supreme Court:** ABSTRACT NOT DENIED TAKEN AS TRUE. Where no additional abstract is filed denying the correctness of the one filed by the appellant, the latter must be taken as true.
2. ———: STRIKING OUT BILL OF EXCEPTIONS. A bill of exceptions will not be stricken from the record on the ground that a paper not properly identified thereby has been interpolated into the transcript and abstract. Such paper might possibly be stricken out on motion.
3. **Recovery of Personal Property:** ACTION AGAINST SHERIFF WHO HAS PARTED WITH POSSESSION. Under § 3239 of the Code, an action for the recovery of personal property wrongfully levied upon and sold by a sheriff to pay another's debt, may be begun and maintained against the sheriff, notwithstanding he may have sold the property and parted with the possession thereof, provided due notice of plaintiff's ownership was served upon him while in possession.
4. **Fraud:** COLLUSION TO COVER TITLE: EVIDENCE. Where it was sought to show that the plaintiff's title to the goods in question was fraudulent, and was set up in order to defeat the creditors of the plaintiff's father, who was alleged to be the real owner, it was not competent to show that the father had attempted to put a portion of his goods beyond the reach of his creditors prior to the time when plaintiff claimed to have acquired an interest in the goods.

62	65
86	514
62	65
95	339
62	65
98	606
62	65
107	382
62	65
111	444
62	65
127	265
127	727

Hardy v. Moore.

5. ———: ———: ———: **DECLARATIONS OF PARTY IN POSSESSION.** In such case, the declarations of the father, who was in possession of the goods, though made in the absence of the plaintiff, were material to show in what capacity he was in possession, whether in his own right or as clerk for the plaintiff.
6. ———: ———: ———. In such case, also, judgments against the father were properly admitted in evidence for the purpose of showing that he was in debt, there being some evidence to show that the plaintiff knew of such indebtedness, at the time when he claimed to have acquired an interest in the property.
7. ———: ———: **EVIDENCE OF INDEPENDENT TRANSACTION.** Where two transactions are claimed to be fraudulent, only one of which, however, is controverted, it must be shown that they are so connected as to evince a common purpose, before the uncontroverted transaction can be admitted in evidence for the purpose of establishing the other to be fraudulent. Much less, in such a case, can an uncontroverted transaction, which is not shown to be fraudulent, and which was too remote in time to raise any presumption of its being connected in purpose with the other, be admitted in evidence.
8. ———: ———: **BURDEN OF PROOF: INSTRUCTION.** In an action to recover personal property, where the defense was that plaintiff's title was fraudulent, before the burden of proof to show the fraud was cast upon defendant, it was necessary for the plaintiff to show title in himself, and the court in this case properly so instructed.

Appeal from Cherokee District Court.

FRIDAY, OCTOBER 19.

ACTION to recover possession of personal property, and damages for its unlawful detention. No bond was executed, and the property was not delivered to the plaintiff. The answer consisted of a general denial, and the defendant pleaded that he was sheriff, and had taken the property under an execution against I. P. Hardy, who in fact was the owner and in possession of the property, and that I. P. Hardy made an arrangement with the plaintiff, whereby he, for the purpose of defrauding his creditors, did business in the name of his son, the plaintiff, and the latter claimed to own the property, but that such claim was fraudulent as against the creditors of I. P. Hardy. Trial by jury, verdict and judgment for the defendant, and plaintiff appeals.

Hardy v. Moore.

*Joy & Wright and Kellogg & Herrick, for appellant.**Chase & Taylor and J. D. F. Smith, for appellee.*

SEEVERS, J.—I. A motion has been made to strike out the bill of exceptions on the grounds: *First*—That it is a skeleton bill, and the short hand reporter's transcript of his notes is only partial, and does not include all the writings introduced in evidence; *Second*—

1. PRACTICE :
in supreme
court: ab-
stract not de-
nied taken as
true.

That the clerk, in making up the transcript, included not only the reporter's notes and writings certified by him, but also included other writings purporting to have been introduced in evidence, which were not certified by the reporter, or included in his transcript. Conceding this to be true, it constitutes no ground for striking the bill of exceptions. Although the bill is skeleton in form, it refers to the evidence, and identifies it more at length and with greater particularity than is usual or necessary. There has been no additional abstract filed denying the correctness of the one filed by the appellant. This being so, the latter is regarded as a verity, and we have no occasion to look into the transcript. Concede it to be true that the clerk, or some one else, has interpolated into the transcript and abstract a paper not properly identified by the bill of exceptions, this will not warrant the striking of the bill of exceptions from the record. It may possibly be that such paper should be struck out, but no such motion is before us. The motion to strike the bill of exceptions must be overruled.

2.—: strik-
ing out bill of
exceptions.

II. The defendant levied on the property in controversy on the 22nd day of October, 1879, and, on the 30th day of said month, the plaintiff served on defendant the notice of ownership required by the statute. The defendant proceeded to advertize and sell the property under the execution. Afterward, in February, 1880, this action was commenced.

3. RECOVERY
of personal
property: ac-
tion against
sheriff who
has parted
with posses-
sion.

The appellee insists, as the property was not in his posses-

sion when the action was commenced, that it cannot be maintained; and that the court should so have instructed the jury. We cannot concur in this proposition. If the defendant, when notice of ownership was served on him, or perhaps at any time afterward, before the trial, had disclaimed being in "possession of the property, and did not claim any interest in it," it may be he would not be liable in this action. *Coffin v. Gephart*, 18 Iowa, 256. The defendant refused to recognize the plaintiff as owner, and proceeded wrongfully, it must be conceded on plaintiff's theory, to sell his property to pay another's debt. The defendant, before selling, could, under the statute, have demanded a bond for his own protection, and at no time has he disclaimed having an interest in the property. We think, under the statute, the action can be maintained, and if the plaintiff establishes his right to the property, he may have judgment for the value of such right. Code, § 3239.

III. The property in controversy consisted of a stock of merchandise. I. P. Hardy owned a stock of goods, which he mortgaged to one Booge, who foreclosed the mortgage by notice and sale under the statute. The plaintiff claims that I. P. Hardy purchased some goods at the sale for him, and the defendant claims that the goods were purchased by said Hardy for himself. There was evidence tending to support both theories. One Steever, plaintiff claims, purchased some goods at said sale, and afterward purchased those bought by plaintiff, and employed I. P. Hardy as his clerk, and proceeded to sell the goods at retail in the usual way. The defendant claims that the arrangement with Steever was fraudulent and void as to the creditors of I. P. Hardy, who, defendant insists, in fact owned the goods claimed by Steever. A short time after the Steever arrangement was made, the plaintiff claims to have bought the goods of Steever, and to have employed I. P. Hardy as his clerk to sell the same, with authority to purchase other goods from time to time, and generally to conduct the business as

4. FRAUD :
collusion to
cover title:
evidence.

Hardy v. Moore.

he, I. P. Hardy, thought best. This was in May, 1877; and the business was so conducted until October, 1879, when the levy was made. During said time the plaintiff was engaged in farming. He was seldom at the store, and did not give much personal attention to the business. There was evidence tending to show that, prior to the foreclosure of the Booge mortgage, I. P. Hardy purchased a small amount of goods, which he took and kept at his house. The defendant asked the said Hardy when on the stand as a witness: "What made you take these goods to to the house?" An objection to the question was overruled, and the witness answered: "I took them to the house because they were not covered by the mortgage; they came after the mortgage to Booge was given." Thereupon counsel for plaintiff said to the witness: "You took them there, then, so they would not be liable to be sold for your debts." An objection to this question was overruled, and the witness answered: "No."

Inasmuch as the transaction spoken of by the witness took place prior to the time plaintiff claims to have purchased the goods, the evidence as to him was inadmissible. It is difficult to see upon what ground the admissibility of this evidence can be properly placed. Concede that the transaction spoken of tended to show fraud on the part of I. P. Hardy, yet, as it took place long prior to the time plaintiff was interested in the goods, he ought not be prejudiced thereby. The same is true as to the evidence of the witness Taylor.

IV. One Hittgen was a witness for the defendant, and gave evidence tending to show that I. P. Hardy was in the exclusive possession of the store, and doing business in his own name, after the plaintiff claims to have purchased the goods of Steever. Hittgen was doing business in the same town, and it was agreed between him and said Hardy that they would not sell salt below a certain price. Hittgen ascertained that the agreement had been broken by the plaintiff and his brother. When Hittgen was on the witness stand, the defendant asked him: "What did

b. —: —:;
—: declar-
ations of party
in possession.

I. P. Hardy say about that." An objection to the question was overruled, and the witness answered: "He said the boys had no business to sell that salt."

In 1878 and 1879, I. P. Hardy made the requisite affidavits and applied for a license to sell tobacco and cigars in his own name in the store. This evidence was objected to, but the objection was overruled.

It is urged that the foregoing evidence should not have been admitted, because the plaintiff was not present when the admission was made. But we think the evidence was admissible as explanatory of the possession of I. P. Hardy.

The inquiry was material whether I. P. Hardy was in possession in his own right or as clerk for the plaintiff. We think the declarations of said Hardy were admissible for the purpose of showing in what capacity he was in possession. *Blake v. Graves*, 18 Iowa, 312.

V. Certain judgments against I. P. Hardy were introduced in evidence, which had been rendered a short time before the plaintiff claims to have purchased the goods. This evidence tended to show that I. P. Hardy was in debt, and we think it is competent, and might prove exceedingly important, if it appeared that the plaintiff had knowledge of such indebtedness. There was evidence tending, it may be remotely, to show that the plaintiff had such knowledge.

VI. The defendant also introduced in evidence certain conveyances made by I. P. Hardy to the the plaintiff, A. H. Hardy, and others, of real estate, executed in 1875 and 1876. An objection to this evidence was sustained. It seems to us that this ruling of the court is erroneous. It is not shown that the conveyances were fraudulent, or part of a scheme or conspiracy, and the evidence must have been admitted on the theory that it tended to show the transaction in controversy to be fraudulent. But this could not be so if the conveyances were made in good faith, and such is the presumption, in the absence of any

7. —: —: evidence of independent transaction.

showing to the contrary. There was no connection between the conveyance of land and the purchase of Steever, or the subsequent conduct of the business. The transactions were nearly two years apart, and, in the absence of any evidence that the conveyances were a part of a fraudulent scheme or conspiracy which culminated in the transaction in question, we do not think the evidence was admissible. Where two transactions are claimed to be fraudulent, only one of which, however, is being controverted, it must be shown that they are so connected as to evince a common purpose, before the uncontroverted transaction can be admitted in evidence for the purpose of establishing the other to be fraudulent. *Williams v. Robbins*, 15 Gray, 590.

If the conveyances had been made a short time, say a month or two, prior to the purchase of goods at the mortgage foreclosure and the purchase of Steever, it may be that the evidence would have been admissible, and it would be for the jury to say as to the common design and purpose. The conveyances were too remote from the principal transaction to warrant such an inference.

It is urged that this evidence is not prejudicial; but, judging from the line of argument taken by counsel for the appellee, we should think it was clearly prejudicial.

VII. The plaintiff asked an instruction, in substance, that fraud is never presumed, but must be established, and that the burden was on defendant. This instruction was given with this qualification: "This is true after the plaintiff first shows title in himself." We think the modification made by the court is correct. Clearly, the burden was on the plaintiff to show that he was the owner of the goods in controversy.

But counsel for appellant insist that the evidence shows both the title and possession to be in plaintiff. We, however, think there was evidence tending to show that I. P. Hardy was in possession in his own right. The third instruction asked, or one of similar import, should have been given. We

s. —: —: —:
burden of
proof: in-
struction.

Lambert v. Shitler et al.

think the court inadvertently omitted to instruct the jury fully on the question presented in the third instruction asked. Because of the subsequent action of the court, we doubt if this failure was prejudicial, but we need not determine this question.

The remaining errors discussed by counsel will not probably occur on another trial.

REVERSED.

LAMBERT V. SHITLER ET AL.

1. **Surety: DISCHARGE OF BY EXTENSION OF TIME THROUGH COMPOSITION WITH CREDITORS.** Where plaintiff and other creditors of the principal debtor for a valuable consideration entered into an agreement with the latter, whereby they agreed, on certain terms therein named, to discount their claims, and such agreement involved an extension of time upon plaintiff's demand, *held* that by such agreement the surety, who did not consent thereto, was discharged.

Appeal from Johnson District Court.

FRIDAY, OCTOBER 19.

THE plaintiff, as sole heir of John Lambert, deceased, brings this action to recover the balance of a note for \$850, due June 16, 1876, executed to John Lambert by Christain Shitler and Joseph Shitler. The defendant, Joseph Shitler, for answer alleges that he was merely a surety upon the note, and that in the month of May, 1877, after the note became due, John Lambert, for a valuable consideration, extended the time on said note to Christain Shitler, the principal thereon. The answer further alleges that on the 20th day of March, 1877, Christain Shitler, the principal on said note, having absconded, action was instituted in the name of John Lambert against Christain Shitler for the protection of this defendant as surety, and a writ of attachment was levied upon the property of Christain Shitler not exempt from execution,

Lambert v. Shitler et al.

more than sufficient to satisfy said debt, and that, for a new and valuable consideration moving from Christain Shitler to said Lambert, he, without the concurrence of this defendant, released and discharged said attachment, whereby this defendant was discharged from any further liability upon said note. The cause was tried to the court, and judgment was rendered in favor of the plaintiff. The defendant, Joseph Shitler, appeals.

Boal and Jackson, for appellant.

S. H. Fairall, for appellee.

DAY, CH. J.—The material facts of this case are as follows: Joseph Shitler was a mere surety upon the note in question, and that fact was known to the payee, John Lambert. On the 20th of March, 1877, Joseph Shitler procured his attorney, S. M. Finch, Esq., to commence in the name of John Lambert an action against Christain Shitler on said note, and on the same day caused an attachment to be levied upon two hundred and ninety acres of land, worth from \$40 to \$45 per acre, forty acres of which was the homestead of Christain Shitler. There was a mortgage upon this property for about \$4,500, and prior attachments for the amount of \$5,724.73, and one levied concurrently with the attachment in question for \$1,000. On the 20th day of May, 1877, John Lambert and twenty-one other attaching creditors of Christain Shitler entered into an agreement with him as follows: "Whereas Christain Shitler is largely indebted to various persons, largely beyond his ability to liquidate the same, he being willing, however, to turn over all his property for the liquidation of the said indebtedness, save and except a small portion of his property which we have all agreed that he should retain, and whereas certain of his friends have agreed to answer a large portion of his indebtedness for him, in consideration of the transfer of his property to persons in trust, to be used by them in the liquidation of said indebtedness, now, therefore,

we, the subscribers, creditors of the said Christain Shitler, in consideration of the agreements aforesaid, do hereby bind ourselves that, in order to carry out said agreement, we and each of us hereby agree to discount the claims we hold against said shitler in the amount we each affix to this agreement. And, in consideration hereof, we do further agree to release and discharge the said Shitler in full, upon the payment to us of the amount of our respective claims, in cash or approved notes, less the discount, herein specified in this agreement; it being hereby understood that all the property and avails of said Shitler, and the amounts subscribed by his friends, are to be placed in the hands of trustees, to be by them turned into money or secured notes, and paid over to us *pro rata*, as fast as the proceeds can be so converted by said trustees into money; and as soon as our respective amounts are so paid over and liquidated, as above provided, we then will each respectively execute a receipt in full to said trustees for said Shitler, thereby releasing him from any further demand by us by reason of his indebtedness to us as aforesaid. And it is hereby agreed and expressly understood that, when the terms of this agreement are fully carried out, all persons who are sureties of the said Shitler are hereby also released from any liability thereon, by reason of this agreement hereby entered into. It is hereby agreed, also, that all creditors or sureties having commenced suit against said Shitler, either by attachment or otherwise, shall receive costs incurred in said suits. We further agree that, in addition to the discounts made below, we will rebate the interest for nine months, unless the money is sooner realized for payment of these claims. And it is further agreed that any legal proceedings that may have been commenced by us against the said Shitler, or his property or sureties, will be dismissed by us, respectively, who have commenced the same."

Here follow the names of the various creditors, including the name of John Lambert, with the amounts they had agreed to discount their claims. When the agreement was

called to the attention of the court, all the attachment suits were dismissed, the following entry being made: "And it further appearing that, under said agreement, deeds for the lands of Christain Shitler have been made by said Shitler and wife to said trustees, the said suits are severally dismissed, and the attachments levied on said lands are released, the same being done by mutual agreement of parties." S. M. Finch, the attorney who commenced the suit of *Lambert v. Christain Shitler*, was present, and stated that if this agreement dismissed the cases they ought to be dismissed.

It is insisted by the appellant that this agreement operated to extend time to the principal, and that the surety is thereby discharged. The agreement was supported by the consideration that Lambert agreed to turn over exempt property, and his friends agreed to answer a large portion of his indebtedness. What, then, was the legal effect of this agreement? Could Lambert, after having entered into the agreement, have employed ordinary remedies for the collection of his debt? He entered into the agreement in connection with twenty-one other attaching creditors. In this agreement, all of the creditors stipulate that all the property of Shitler, and the amounts subscribed by his friends, shall be placed in the hands of trustees, and turned into money, and paid over *pro rata*, as fast as the proceeds can be converted into money. The parties further agree to rebate the interest for nine months, unless the money is sooner realized for payment of the claims; from which it appears that the parties contemplated nine months as probably necessary to convert the property into money and pay upon the claims. Now, it is evident, we think, that Lambert could not have proceeded by ordinary suit, and the sequestration of the property of Shitler, without violating the terms of this agreement. The agreement, it is to be observed, covers all the property of Shitler, except a small portion which the creditors agreed he should retain. If Lambert, notwithstanding the agreement, had a right to sue, and appropriate a portion of Shitler's property, all the

Goepinger v. Ringland.

other creditors had the same right. But it is evident that an exercise of this right by all the creditors would utterly defeat the agreement. The agreement cannot subsist consistently with the right of the creditors to avail themselves of the ordinary processes for the collection of their debts. The agreement, therefore, suspended the right of successful suit, and operated as an extension of time to the principal debtor. It is not necessary to the discharge of the surety that there should be an express agreement to extend time to the principal. It is sufficient if that is the necessary effect of the agreement entered into. Brandt on Suretyship, § 304; *Brooks v. Wright*, 13 Allen, 72; *Hershler v. Reynolds*, 22 Iowa, 152; *Perry v. Armstrong*, 39 N. H., 583. The agreement entered into between Christain Shitler and his creditors, in our opinion, suspends the right to enforce their claims by suit until the property turned over to the trustee could be converted into money and applied *pro rata* upon the debts; and the surety, we think, was by this agreement discharged. See Brandt on Suretyship, sections 296 and 304; *Ducker v. Rapp*, 67 N. Y., 464; *Bonney v. Bonney*, 29 Iowa, 448; *Bangs v. Strong*, 7 Hill, 250; *Rupert v. Grant*, 6 Smedes & M., 433. The judgment is

REVERSED.

GOEPINGER V. RINGLAND.

1. Real Estate: ACTION AT LAW TO RECOVER: LEGAL TITLE PREVAILS.

In an action at law for the recovery of the possession of real estate, where no equitable defense is pleaded, the legal title must prevail.

Appeal from Boone District Court.

FRIDAY, OCTOBER 19.

ACTION at law to recover possession of real estate. The defendant pleaded that he was in possession of the premises,

and had been for more than ten years, and that John I. Blair owned the real estate in controversy, and sold the same to Fuller, to whom a contract was given, whereby Blair agreed to convey to Fuller upon the payment of the purchase-money; and that Fuller had assigned the contract to defendant. The court directed the jury to find for the defendant, and plaintiffs appeal.

N. D. Parkhurst, for appellant.

Hull & Whitaker, for appellee.

SEEVERS, J.—The undisputed evidence shows the plaintiffs to be the owners of the legal title to the real estate in controversy. No equitable defense was pleaded. In an action at law, the legal title must prevail, and the court erred in directing the jury to find for the defendant. *Page v. Cole*, 6 Iowa, 153; *Pendergast v. B. & M. R. R. Co.*, 53 Id., 326.

The court must, we think, have made the erroneous ruling because of the prominence give on the trial to the question of forfeiture, and whether the same had been waived. We regard these questions as immaterial, in the absence of an equitable defense having been pleaded. The defense of the statute of limitations is not insisted on in argument.

REVERSED.

DE FORREST V. BUTLER.

1. **Pleading and Practice:** ARGUMENTATIVE DENIAL STRICKEN OUT. Where in addition to a general denial defendant pleaded matter which amounted to nothing more than an argumentative denial, all of which was admissible under the general denial, the striking out of such matter on motion could not have prejudiced the defendant, and was not error.
2. **Action for Services:** EVIDENCE TO DEFEAT. Where one sued for certain services alleged to have been rendered to defendant, and a general denial was pleaded, it was error to exclude as evidence an award and judgment thereon rendered in favor of plaintiff and against a third person on account of the same services. The offered testimony tended to show that the services were not rendered to defendant.

Appeal from Polk Circuit Court.

FRIDAY, OCTOBER 19.

THIS is an action to recover of defendant commissions, which the plaintiff alleges he earned as an employe of the defendant in the sale of McCormick machinery in the year 1878. The cause was tried to a jury, and judgment was rendered in favor of plaintiff for \$147.50. The defendant appeals. The material facts are stated in the opinion.

J. R. Barcroft and Crom Bowen, for appellant.

W. S. Sickmon, for appellee.

DAY, CH. J.—I. In addition to a general denial of the plaintiff's claim, the defendant in his answer alleged as follows: "And for further answer and defense, the defendant alleges that said DeForrest was, during the year 1878, in the employ of one Thomas Braden, in the sale of and canvassing for sale of said McCormick machinery; that, at the close of said year 1878, said DeForrest and said Braden, failing to come to an amicable settlement of their affairs, submitted the same to three arbitrators, to-wit, Burnham, Kingman and Lazenby, who were duly qualified as such; that the whole of

said charges for canvassing of said machinery was then submitted and charged by said DeForrest against said Braden, which said charges were allowed and awarded to said DeForrest against said Braden by said arbitrators; that said award was by them filed with D. F. Callender, a justice of the peace in and for Polk county, as by their commission directed, and that judgment upon said award was by said justice of the peace entered in favor of said DeForrest and against Braden, as by their articles of submission provided; and that the same is an adjudication, so far as said DeForrest is concerned, and a bar to this suit." The plaintiff moved to strike out this portion of the answer as frivolous, surplusage, and no defense to plaintiff's cause of action.

The court sustained this motion, and of this action the defendant complains. The facts set forth in this portion of the answer in effect constitute but a mere argumentative denial of the allegation that the plaintiff was employed by the defendant to perform the service for which suit is brought. In so far as these allegations are material, they were all admissible under the general denial contained in defendant's answer. It follows that the defendant was not prejudiced by the sustaining of this motion.

II. The court admitted in evidence an agreement between Tom. Braden and the plaintiff to submit to arbitrators a claim for the same services for which the plaintiff now seeks judgment against the defendant. The court also admitted evidence that the plaintiff testified before the commissioners that he was in the employ of Braden in 1878, and that he claimed of him the commissions for which he now sues. The court refused to admit in evidence the award of the arbitrators, or the judgment of the justice thereon.

Respecting the evidence admitted, the court instructed the jury that it "was admitted for the purpose of showing, or as tending to show, whether said plaintiff, in the year 1878, was in the employment of the defendant, Butler, or not." The award and the judgment thereon ought to have been admitted

for the same purpose. That the plaintiff procured an award against Braden, and followed it up with a judgment against him, would tend to show that the services for which the award and judgment were rendered were performed for Braden, and not for the defendant. In rejecting this evidence, the court erred. As at present advised, we discover no other prejudicial error in the case.

REVERSED.

BUNCE V. WEST ET AL.

1. **Redemption: FROM FORECLOSURE SALE BY ONE NOT A PARTY.** A junior lien holder, who is not made a party to a foreclosure proceeding, may not only redeem from the sale within the statutory period, but he may afterwards redeem by paying the mortgage debt, with interest and other proper charges; and if the purchaser at the foreclosure sale has been in possession, the lien-holder may demand an accounting of the rents and profits, and have the same applied on the mortgage debt.
2. —: —: **PLEADING OFFER TO PAY.** In such case an offer, in the petition of the lien-holder seeking to redeem, to pay any balance that may be found due from him, is sufficient.

Appeal from Cerro Gordo District Court.

FRIDAY, OCTOBER 19.

ACTION by a judgment lien-holder to redeem certain real estate from a prior mortgage debt. The petition shows that the mortgage has been foreclosed, and the property sold upon execution; that the defendant, West, claims to have purchased the same at the sale, and that the defendant, Sanborn, claims to have acquired the property through West; that the plaintiff is the assignee and owner of a judgment, which was a lien upon the property at the time the foreclosure action was commenced, and that neither she nor her assignor was made a party. The petition also shows that Sanborn has been in possession and enjoyed the rents and profits, and it

asks for an accounting, and it contains an offer to pay any balance that may be found due.

The defendants demurred to the petition, and the demurrer was sustained. The plaintiff electing to stand upon her petition, judgment was rendered against her for costs. She now appeals.

Miller & Cliggett, for appellant.

Wilber & Sherwin and *Blythe & Markley*, for appellees.

ADAMS, J.—In an action to foreclose a mortgage, a person holding a subsequent lien upon the property should be made a party. Otherwise he may not only redeem from the sale within the statutory period, by paying the amount of the bid with interest, but, if he neglect to do so, he may still redeem from the mortgage debt by paying that, with interest, and any other proper charge; and, if any parties holding under the foreclosure have been in receipt of the rents and profits, the lien-holder having a right to redeem may have an accounting of the rents and profits, and an application made thereof as against the mortgage debt. In such case, an offer made in the petition to pay any sum that may be found due is a sufficient offer. We think that the petition shows that the plaintiff is entitled to have an account taken of the rents and profits received and taxes paid by the defendants, or either of them, and that she is entitled to redeem from the mortgage debt by paying such balance as may be found to be equitably due to the defendants, or either of them. *Anson v. Anson*, 20 Iowa, 55; *Wright v. Howell*, 35 Iowa, 288; *The Am. Buttonhole etc. Co. v. Burlington Mut. Loan Asso.*, 61 Iowa, 464; *Ayres v. Adair County*, Id., 728.

REVERSED.

HAGGARD V. HAGGARD.

1. **Divorce: ADULTERY: EVIDENCE CONSIDERED.** The admissions of defendant, made in the spirit of boasting, and the direct but improbable testimony of a hostile witness, considered, and *held* not sufficient to establish the charge of adultery as a ground for divorce.

Appeal from Carroll District Court.

FRIDAY, OCTOBER 19.

ACTION FOR A DIVORCE. Upon a trial on the merits, a decree was rendered divorcing the parties. Defendant appeals.

M. W. Beach, for appellant.

Betzer & Scott, for appellee.

BECK, J.—I. The plaintiff seeks a divorce on the ground of adultery committed by defendant. The charge is supported by evidence introduced to show that defendant confessed having committed the offense. But the testimony is extremely vague and unsatisfactory, and impresses us that the alleged admissions were made during the progress of an unclean conversation had with rough young men, more in the spirit of boasting than as a truthful assertion. The testimony on this point lacks explicitness and particularity.

II. One witness testifies that she surprised defendant *flagrante delicto*. With particularity she relates the facts, and her testimony is positive and direct. We are not able to credit it for the following reasons: The woman, whom she accuses as being a partner in defendant's crime, was her own daughter, and a sister-in-law of defendant. The act, as alleged, occurred at the witness' house, where her daughter lived with her husband, and during his last illness, of which he died about that time. This was about a month before the birth of a child of the daughter. The circumstances con-

Kempton v. State Ins. Co.

nected with the witness' discovery of the parties while in the act, are improbable, as showing a fearlessness of exposure hardly ever shown by even the most abandoned woman. The character of the daughter is shown to have been good, and the witness' character for honesty and truth is far from being above suspicion. Add to all this the fact that enmity and ill feeling exists on the part of the witness towards her daughter, for the reason that, after her husband's death, she left her mother's home and went to live with her husband's brother, where defendant resided. The daughter and defendant in their testimony both directly and explicitly deny the mother's evidence. We reach the conclusion that the petition of plaintiff ought to be dismissed.

REVERSED.

KEMPTON V. STATE INS. CO.

1. **Insurance:** PROVISION RESTRICTING SALE STRICTLY CONSTRUED. A provision in a policy of insurance which imposes a restriction upon the right of disposing of the insured property should be strictly construed against the insurer; and, to constitute a sale within the meaning of such a provision, the right to the property sold, and to the possession thereof, must pass from the vendor to the vendee. And where the insured entered into a contract to convey the property at a future day upon payment of the purchase money, but before the contract was consummated and possession given the property was destroyed by fire, *held* that the insured had not parted with his insurable interest, and that he could recover on the policy, notwithstanding a provision therein that the policy should be void in case of a sale made without the consent of the company.

Appeal from Polk Circuit Court.

FRIDAY, OCTOBER 19.

THIS is an action upon a policy of insurance issued on the twenty-eighth day of November, 1877, for the term of five

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126	551

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years, to recover for losses by fire occasioned to the insured property on the twenty-third day of September, 1881.

The answer alleges that the policy contains a provision that, "if said property shall be sold, conveyed or encumbered, in whole or in part, whether by legal process, judicial decree, mortgage, voluntary transfer or otherwise, * * * without the written consent of this company obtained, the policy shall in either event immediately thereafter cease and be null and void;" that the plaintiff, on the thirtieth day of March, 1881, executed and delivered a written instrument for the sale of said premises as follows: "Daniel Kempton agrees to sell his farm of seventy and fifty-five hundredths acres for \$35 per acre * * * to George H. Warner, secretary, and for the American Emigrant company, of Hartford, Connecticut, and give possession of the same on or before November 1, 1881, but not before October 1, 1881, and agrees to deposit a good and sufficient warranty deed for said farm with Mr. C. E. Fuller, in the office of the Iowa Loan and Trust company, executed by said Kempton and Mary Jane Kempton, his wife, within a few days after signing this contract, to be delivered to said Warner as provided below. Geo. H. Warner, secretary of American Emigrant Company, agrees to pay the said Fuller the above stipulated price of \$35 per acre, and lift the said deed in C. E. Fuller's hands, upon possession of farm being given by said Kempton, but not before October 1, 1881. * * * Said farm and buildings are to be delivered by Kempton in as good condition as they are now in, the destruction by the elements excepted."

The petition further alleges that, on the twelfth day of October, 1881, the plaintiff, pursuant to said contract, executed to the American Emigrant company a warranty deed for said premises, and that, by reason of the facts stated, the policy was void at the time of the loss, and the plaintiff had no insurable interest in the property. A demurrer was filed

to this answer, which was sustained, and judgment was rendered for the plaintiff. The defendant appeals.

Wright, Cummins & Wright, for appellant.

Harvey & Davis, for appellee.

DAY, CH. J.—I. It is insisted that the execution and delivery of the written contract above referred to constituted a sale of the property within the meaning of the policy. That it did not constitute a sale within the meaning of the policy is established, so far as we have been able to discover, by an unbroken current of authority. In *Washington Fire Insurance Company v. Kelly*, 32 Md., 421, the policy contained a provision that, "if the property shall be sold or conveyed, or if the policy shall be assigned, without the consent of the company in writing thereon, then this policy shall be null and void." After contracting the insurance, the assured contracted in writing to sell the premises, and received a payment of \$10,000. In determining the effect of this contract upon the policy, the court say: "The provision of the policy in the Washington Fire Insurance company against the sale or conveyance of the property insured, and against the assignment of the policy without the consent of the insurers, as it imposes a restriction upon the right of disposing of property, should be construed, as any other contract with like provision, with strictness, and nothing less than the absolute sale or conveyance of the property, with all the usual legal ingredients to constitute the transaction as such, or similar complete assignment of the policy, can be considered as sufficient to avoid the policy on that account.

* * *. The proviso is a restriction of the sale or conveyance of the property insured, and, when the sale or conveyance is relied upon by the insurers to prevent the recovery for any loss by fire, the sale or conveyance must be made out full and complete. To constitute a sale within the meaning and terms of the proviso, the right to the property

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sold, and to the possession thereof, must pass from the vendor to the vendee. The mere contract for the sale or conveyance, not divesting the title of the vendor and vesting the same in the vendee, is not a breach of the proviso. A contract to convey the buildings insured at a future day, on payment of the purchase money, and between the time of contract and its consummation, they are destroyed by fire, the vendor being in possession, it is not such an alienation as vacates the policy." To the same effect see the following authorities: *Hill v. The Cumberland Valley Mutual Protection Co.*, 59 Pa. St., 474; *Browning v. The Home Insurance Co.*, 71 N. Y., 508; Angell on Insurance, § 206; Wood on Insurance, § 329, and authorities cited; May on Insurance, § 267, and authorities cited. In our opinion, the contract in question does not avoid the policy.

II. It is insisted that plaintiff, after the execution of the contract, did not retain an insurable interest in the property. That this position is not tenable, see the following authorities: *Trumbull v. The Portage County Mutual Ins. Company*, 12 Ohio, 305; *Hill v. Cumberland Valley Mutual Prot. Co.*, 59 Pa. St., 474, and authorities cited; Wood on Insurance, § 330; Flanders on Insurance, pp. 385-6. *Insurance Company v. Updegraff*, 21 Pa. St., 513; *Lazarus v. The Commonwealth Insurance Co.*, 19 Pick., 81; *Perry County Insurance Company v. Stewart*, 19 Pa. St., 45. The judgment is

AFFIRMED.

WING V. PAGE.

1. **Assignment of Open Account: SUBSEQUENT PAYMENT, AFTER NOTICE, TO ASSIGNOR: DEFENSE OF PAYMENT.** Where one had an open account against defendant, which he assigned to plaintiff, of which assignment plaintiff gave defendant notice, whereupon defendant wrote to plaintiff that he was ready to settle, but afterwards, and before suit brought by plaintiff, defendant settled with and paid plaintiff's assignor, *held* that such settlement and payment were a defense to plaintiff's suit, under §§ 2086 and 2087 of the Code, and that under the statute the question of notice was not material. *Zugg v. Turner*, 8 Iowa, 223, and *Reynolds v. Martin*, 51 Id., 324, followed.

Appeal from Linn District Court.

FRIDAY, OCTOBER 19.

ACTION to recover upon an account against defendant for certain work and labor done for defendant by one Farnsworth, the assignor of plaintiff. There was a trial by the court, and judgment for the plaintiff. Defendant appeals.

J. C. Davis, for appellant.

No appearance for appellee.

ROTHBROOK, J.—The evidence shows that on the ninth of June, 1879, the plaintiff took a written assignment of the account from Farnsworth. On the next day he mailed a written notice of the assignment to the defendant, in which he stated to the defendant that no payment should be made to any one without plaintiff's order. Defendant, by reply which was received by plaintiff on June 17, acknowledged receipt of the notice, and stated that he was ready to settle with plaintiff. Afterwards, about June 20, the plaintiff received a letter from the defendant, stating that there was a balance of \$25 due on the account. The defendant pleaded settlement and payment in full of the account, and introduced a receipt for \$15, signed by Farnsworth, dated June 24, 1879, which acknowledged payment in full of all demands.

Section 2086 of the Code is as follows: "When by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid, but the maker may avail himself of any defense or counter-claim against the assignee, which he may have against the assignor thereof before suit brought."

Section 2087 provides that an assignee of an open account has a right of action in his own name, "but subject to the same defenses and counter-claims as the instruments mentioned in the preceding sections."

We think the payment to Farnsworth before the suit was brought was a good defense, and that the court should have so found. To hold otherwise would require us to ignore the plain provisions of these sections of the statute. It is not a question of notice to the debtor that the account had been assigned to the plaintiff. The question is, did the debtor have any defense to the account, against the assignor, when the suit was brought? He most assuredly had a defense at that time, unless we hold that payment is not a defense, and this no one will claim. But for the statute, an open account is not assignable, and it is wholly immaterial whether a debtor has a defense against the assignor when he receives notice of the assignment, or whether such defense arises afterwards, for the simple reason that the statute creates no right by reason of notice. The point of time fixed by the statute is the commencement of the suit. If at that time he has a defense against the assignor, he may interpose it against the assignee.

This question has already been twice determined by this court. *Zugg v. Turner*, 8 Iowa, 223; *Reynolds v. Martin*, 51 Id., 324.

REVERSED.

ON REHEARING.

SEEVERS, J.—Counsel for the appellee insist that the account sued on is not an "open account," and, therefore, not

governed by Code, § § 2086 and 2087, but that it is an account stated, and, therefore, governed by § 2546 of the Code.

The abstracts shows that Farnsworth assigned all his "right and title to my account for grubbing" to the plaintiff. In the notice to the defendant, plaintiff said: "Farnsworth has sold and assigned to me his account for grubbing." Afterward the plaintiff wrote to defendant to ascertain the amount due.

If such amount had been admitted and had become an account stated, this inquiry would have been unnecessary. We think the account, when assigned, was an open account, and, therefore, governed by Code, § § 2086 and 2087. The notice of the assignment had no effect on the rights of the parties. The former opinion is adhered to.

GREEN V. RONEN.

1. **Practice in Supreme Court: REHEARING ON PETITION ONLY.** After the court has examined the record in a cause, and filed an opinion dismissing the appeal on the ground of defects in the record, it is not competent for the appellant, without obtaining a rehearing, to simply ignore the former decision, and bring the case again before the court upon a corrected record.

Appeal from Jones District Court.

FRIDAY, OCTOBER 19.

THE facts are stated in the opinion.

Remley & Ercanbrack, and *Sheean & McCarn*, for appellant.

Ezra Keeler, for appellee.

DAY, CH. J.—The decision in this cause was rendered, in the court below, on the 14th day of October, 1881. On the 30th day of January, 1882, notice of appeal was served to the April, 1882, term at Dubuque.

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The cause was submitted at the said term, and on the 15th day of June, 1882, an opinion was filed dismissing the appeal. See 59 Iowa, 83. At the April, 1883, term, at Dubuque, the cause again appeared on the docket, and it was continued to the June term. No new notice of appeal was filed. Some additions seem to have been made to the original abstract, and, with a pen, the date is changed from the April term, 1882, to April term, 1883.

The appellee filed an amended abstract setting forth the foregoing facts, not otherwise appearing in the record, and submitted with the case a motion, supported by affidavit, to strike the case from the docket, upon the ground that the matter had once been determined. This motion, we think, must be sustained. After the court has examined the record in a cause and filed an opinion dismissing the appeal on the ground of defects in the record, it is not competent for the appellant, without obtaining a rehearing of the former decision, to simply ignore it, and bring the case again before us upon a corrected record. The appellant submits a motion to strike the amended abstract of appellee from the files, because not served within the time required by the rules of court. It was, however, served thirty days before the cause was submitted, and no prejudice could have resulted to appellant from the delay. The appellant also moves to strike from the files the affidavits accompanying appellee's motion, for the reason that the motion was virtually ruled upon at the April term, 1883, at Dubuque. That ruling, however, was only *pro forma*, and to the end that the court might examine the question more carefully upon final submission. The appellant's motion is overruled. The motion of appellee to strike the cause from the docket is

SUSTAINED.

HAMPTON V. MOORHEAD.

1. **Attorney in Fact: POWER TO SELL LAND IS NOT POWER TO EXCHANGE.** Where defendant gave to another a power of attorney to sell certain land, and the attorney disposed of the land to plaintiff for a certain amount of money and a patent right, *held* that the transaction was beyond the power of the attorney; and did not bind defendant to make a conveyance pursuant to the sale; and, in an action for specific performance and general relief, the court properly refused to decree a specific performance, but it was error to make the amount paid to the attorney a lien upon the land, since the money never came into the hands of defendant.
2. **Practice: BILL OF EXCEPTIONS: REPORTER'S NOTES.** Where the original notes of the short-hand reporter are by reference incorporated into a bill of exceptions, the record is in substance complete, so far as the evidence embraced therein is concerned, and that whether the reporter's notes have been certified to by him or not. They will be presumed to have been filed. If a long-hand extension of the notes becomes necessary, it is not for the purpose of completing the record, but only for the purpose of making the completed record intelligible.
3. **Practice in Supreme Court: ABSTRACTING EVIDENCE: PRESUMPTION IN FAVOR OF ABSTRACT.** The appellant may set out the evidence in his abstract from memory, or from his own notes; and if appellee does not controvert the correctness of such abstract it will be taken as true, and all questions concerning the reporter's notes and an extension thereof will become immaterial, and the case will be determined upon the evidence as set out in the abstract.

Appeal from Henry District Court.

FRIDAY, OCTOBER 19.

ACTION in equity for specific performance and for general relief. The plaintiff avers that he purchased of the defendant, Thomas L. Moorhead, through his attorney in fact, J. W. Moorhead, certain land in Henry county, for the agreed price of \$4,750, and paid \$4,500, and was to pay the "balance when a deed should be delivered; that he has offered to pay the balance and has demanded a deed, but that the defendant has refused to execute it."

The defendant for answer denies that he ever sold the land

62	91
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62	91
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143	109

 Hampton v. Moorhead.

to the plaintiff, or any part thereof, and denies that he ever received anything from the plaintiff for said land. Before the trial, the defendant died, and his sole heir, Eliza Moorhead, and his administrator, J. A. Moorhead, were substituted. Upon the trial the court found that the plaintiff purchased the land as alleged, and paid \$2,000 in cash, and made an assignment of a certain patent right. The court refused, under the peculiar circumstances shown, to decree a specific performance, but decreed that the amount paid should be made a lien upon the land, and that the patent right should be reassigned. The defendants appeal.

Amblers & Campbell, for appellants.

Woolson & Babb, for appellee.

ADAMS, J.—There is some evidence tending to show that the power of attorney, by virtue of which the sale is alleged to have been made, was forged, but we do not deem it necessary to determine what the fact was. For the purposes of the opinion it may be conceded that the power of attorney was not forged. But, conceding such fact, we are not able to see how, under the plaintiff's own testimony, the sale can be sustained. While it appears clearly enough that the plaintiff paid \$2,000 in cash, as the court found, yet it was paid only to J. W. Moorhead, and did not, we think, under the circumstances, as shown by the undisputed evidence, become a payment to Thomas L. Moorhead. There is no pretense that any part of the money actually came into Thomas L. Moorhead's hands. This, to be sure, would not have been necessary to constitute a payment to Thomas L., if J. W. had received the money while acting within the scope of his power. But the undisputed evidence shows that he did not thus act. J. W. Moorhead's power was to make a sale. What he undertook to do was to make an exchange, at least so far as the transaction in part was concerned. He took a patent right as a part of the consideration for the land.

1. ATTORNEY
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The language of the power of attorney is not very accurate, but there is no question as to what it means. After describing the land, it sets out the power conferred in these words: "To make sale of the same or any part thereof for such sum or price, and on such terms, as to him (the said attorney) shall seem meet, and to ask, demand, recover and receive all sums of money which shall become due and owing to me by means of such sale or sales, and to take all lawful means for recovery thereof," etc. Under this power, the attorney was authorized to make a sale, and only that. A sale is defined to be "an agreement by which one of two contracting parties, called the seller, gives the thing and passes the title to it for a certain price in current money." Bouvier's Law Dict. It differs from an exchange, where the consideration is paid in property other than money. In Parsons on Cont., Vol. 1, p. 520, it is said: "A sale is distinctly discriminated in many respects from an exchange in law; an exchange being the giving of one thing and receiving of another thing, while a sale is the giving of one thing for that which is a representation of all values." See, also, *Vail v. Strong*, 10 Vt., 457. When, therefore, J. W. Moorhead undertook to take a patent right in part consideration, he undertook to take what he had no authority to do, and the plaintiff should have known it. The trade was, therefore, void. It differed in no respect from what it would have been if there had been no power of attorney. There being no sale, the money received could not be regarded as received in pursuance of a sale, and, it not coming actually into Thomas L. Moorhead's hands, he was not affected by the receipt of it by J. W. Moorhead. We think, then, that the court erred in charging the land with a lien for this money. The plaintiff, however, contends that, whatever may be the merits of the case, we cannot reverse, for want of a proper record.

It is not necessary to determine whether the case is triable *de novo* to enable us to review the question above determined. The action was brought in 1878, and while the pro-

vision was in force for trying equitable actions upon oral evidence. There is an assignment of errors; the abstract purports to contain all the evidence, and sets out a certificate by the judge. The decree appears to have been excepted to.

We find, it is true, an additional abstract by the appellee, in which he says: "The notes of the short-hand reporter were never transcribed into long-hand until after the decree in this case, and such long-hand transcript of the notes of the short-hand reporter has never been filed in the district court where the said case was tried, and in no other court, and there is no entry in the appearance docket showing the filing of the short-hand notes themselves, and they were never certified to."

It must appear, of course, presumptively or otherwise, before any question can be raised upon the evidence, that it was certified. But what is the fact in this respect, taking the appellant's and the appellee's abstracts together? In the appellant's abstract we find, following the evidence, a certificate in these words: "I, W. R. Sellon, short-hand reporter, etc., *
* * * certify that the foregoing pages are a true and correct transcript of all the evidence, both oral and written, introduced or offered on the trial of the cause of, etc., *
* * * together with the rulings of the court, etc.

(Signed.)

"W. R. SELLON."

Following this, we find another in these words: "I, A. H. Stutsman, judge, etc., * * * * * certify that the above and foregoing transcript contains all the evidence introduced or offered on the trial of said cause of, etc., *
* * * together with all objections," etc.

(Signed.)

"A. H. STUTSMAN, *District Judge.*"

We find, also, in the additional abstract by the appellee, that a skeleton bill of exceptions was signed by the judge, in which he states that the case "was heard upon the depositions of John W. Moorhead, Thomas L. Moorhead * * *
* * * and upon the testimony of witnesses, * * *
* * * as shown in the notes of testimony of W. R. Sellon, official short-hand reporter," etc.

The statute provides that the original notes of any testimony taken in any case shall be filed in said case, * * * and said original notes, or the transcript thereof, or any part thereof, may be referred to in any bill of exceptions, and, when duly transcribed and certified, shall be inserted therein on appeal. Code, § 3777.

The original notes were, we will presume, filed in this case. It was the official duty of the short-hand reporter to file them.

2. PRACTICE: There is nothing tending to show that he did not, bill of excep- and the certificate of the judge shows that the tions: report- case was tried in part upon testimony as shown er's notes. by the reporter's notes. Under the statute it was competent to make a skeleton bill of exceptions and incorporate the original notes by mere reference. Such bill was made and filed in this case, and by it the original notes were made a part of the record, and that, too, whether they were certified to by the short-hand reporter or not. Where the original notes are made part of the record by a bill of exceptions, the record is, in substance, complete, so far as the evidence embraced therein is concerned. If a transcript or extension of the notes by the reporter becomes necessary, it is not strictly for the purpose of completing the record, but rather for the purpose of making a completed record intelligible to others than the reporter. The reporter's transcript or extension becomes necessary, of course, if a transcript by the clerk does. But the appellant might set out the evidence in his abstract from memory, or

3. PRACTICE from his own notes, long or short-hand. If the in supreme appellee should be satisfied with the appellant's court: ab- abstract, we see no necessity for the clerk's trans- stracting evi- script, so far as the evidence is concerned, and, if dence: pre- his transcript is not necessary, we see no necessity sumption in for the reporter's transcript. In the case at bar the reporter's favor of ab- transcript appears to have been made, but, according to the stract. appellee's abstract, was not filed. It should, of course, have been filed if it was necessary to make it. But we do not think it was necessary to make it. We have no necessity for the

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clerk's transcript so far as the evidence is concerned. In the view which we have taken of the case, it turns upon a point upon which the evidence is set out in the appellant's abstract, and it is not disputed that the evidence upon this point is correctly set out.

We think, then, that the record is in a condition to call for a review of the question determined, and having, upon that question, reached a conclusion different from that reached by the court below, the judgment must be

REVERSED.

HAUGHEY v. HART.

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1. **Negligence: STOCK RUNNING AT LARGE: OPEN PIT ON LAND NOT INCLOSED: INJURY TO HORSE FALLING THEREIN.** In a county where stock is not restrained from running at large, the owner of a horse is not chargeable with negligence in permitting him to stray upon the uninclosed and uncultivated land of another. But, where defendant dug a well adjacent to the highway upon her uninclosed and uncultivated land, at a place which she knew was frequented by stock running at large, and left the same unguarded and uncovered, she was guilty of negligence, and was liable in damages to plaintiff, whose horse, while lawfully running at large, fell into the well and was killed.

Appeal from Buena Vista Circuit Court.

FRIDAY, OCTOBER 19.

THIS is an action to recover damages for the value of a horse which, it is alleged, was killed by falling into an unfinished well, which the defendant left open and unprotected upon her uninclosed land. There was a demurrer to the petition, which was sustained, and plaintiff appeals.

Snelling & Irwin, for appellant.

Gregory & Bailie, for appellee.

ROTHBROOK, J.—The following is a copy of the petition to which the demurrer was sustained:

“That the defendant was for the six months last past and is now the owner of the following described premises, to-wit: The north half of the northeast quarter of section 29, Grant township, Buena Vista county, Iowa; and that said premises were in the month of January, 1883, and still are, unfenced.

“That defendant caused and permitted to be dug on said unfenced premises a certain dangerous excavation or well, which was and is immediately adjacent to the highway, and knowingly and negligently permitted the same to remain wholly uncovered and unguarded, although she well knew and had been advised that said dangerous excavation was frequented by stock that was running at large. Yet, notwithstanding these facts, she still permitted said dangerous and unsafe excavation to be and remain in the same unsafe condition, and removed from said premises, leaving no one in charge thereof, and taking no precaution whatever to prevent stock from falling into said excavation or well.

“The plaintiff further states that the police regulation, restraining stock from running at large, is not now and never has been in force, as by statute provided, in the county of Buena Vista, Iowa.

“That in and during the month of January, 1883, a certain cream-colored horse belonging to the plaintiff, without any negligence on his part, strayed onto the premises of this defendant, and fell into said dangerous well or excavation, and was thereby killed, without any fault or negligence on the part of this plaintiff.”

The demurrer is based upon several grounds, two of which only need be mentioned. It is claimed in one of these grounds “that there are no facts showing that the negligence of defendant caused the death of the horse.” The other is that “said petition does not show that said horse was lawfully on defendant’s premises at the time of the injury complained of.”

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The facts upon which the alleged negligence is based, briefly stated, are that the land of the defendant is unfenced, and that upon the land, and immediately adjacent to a highway, she made a dangerous excavation, and negligently allowed the same to remain uncovered, although she well knew that the place where said excavation was situated was frequented by stock running at large. Was this negligence for which plaintiff was liable? We think the liability depends upon the fact whether or not the plaintiff's horse was rightfully running at large upon defendant's premises. It is claimed that, as the county of Buena Vista has not restrained stock from running at large, the horse was rightfully at the place where he was killed. It was long ago held in this state that the owner of cattle running at large upon the land of another was not liable in trespass. In other words, it was held that cattle were free commoners, and that the mere fact of permitting cattle to run at large is not a ground of imputing negligence to the owner. *Wagner v. Bissell*, 3 Iowa, 396; *Heath v. Coltenback*, 5 Id., 490; *Alger v. Miss. & Missouri R'y Co.*, 10 Id., 268. And this is the law of this state at the present time, excepting in those counties where stock is restrained from running at large. What the rights of owners of stock in such counties are we need not determine.

The plaintiff was not chargeable with negligence in allowing his horse to run at large upon the uninclosed land of another. At least, this must be so, unless it should appear that he was injuring the crops of the plaintiff at or near the uncovered well. Whether or not this would, under the law, change the rule above announced, we need not determine in this case.

In the case of *Young v. Harvey*, 16 Ind., 314, the defendant commenced digging a well on an uninclosed lot owned by him in a suburb of Indianapolis. After sinking the well to the depth of six feet, he abandoned it and left it uncovered. The hole or pit was useless. The horse of plaintiff,

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while lawfully grazing on the common, fell into the well and was killed. It was held that an action for damages could be maintained by the owner of the horse. The opinion in that case appears to be based upon the thought that, owing to the large number of animals which were allowed to graze upon the premises, there was a strong probability of injury and damages arising from the unprotected excavation.

In *Shearman & Redfield on Negligence*, p. 599, it is said: "Of course, it is culpable negligence to leave a pit or other excavation in such an unguarded state as to cause injury to a person having a right to be upon the land, and using that right with ordinary care." In *Addison on Torts*, 201, it is said: "Every occupier of land, who allows wells or mining shafts to remain on his land unguarded and unprotected, is responsible in damages to all persons falling into them, provided they were lawfully traversing the land on which the shaft or well existed, and fell into it without any negligence or misconduct on their part; but if they were at the time trespassers on the land, and the well or shaft was more than twenty-five yards from a public carriage way, they will not be entitled to recover." The reference to the rights of the parties within twenty-five yards from a public carriage way is made, because of the provisions of the general highway act in England.

It appears from these authorities that the rights of the parties are made to turn upon whether or not the injured person or animal was, at the time of receiving the injury, rightfully upon the defendant's premises. And in the case of *Young v. Harvey*, *supra*, stress is laid upon the fact that there was a strong probability of injury by reason of the large number of animals grazing upon the common. We think that, if the owner of unimproved and unbroken land should make an excavation thereon at a place remote from where stock is accustomed to roam, and leave the excavation uncovered, he should not be held liable for injuries to animals falling into it. But it is averred in the petition that

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the excavation was immediately adjacent to a highway, and in a place which the defendant knew was frequented by stock running at large. In such case, we think the omission to cover or protect the excavation was negligence. The question of negligence, or freedom from negligence, should be determined by the other question, whether or not a person exercising reasonable care and prudence would apprehend that there was a probability of injury to persons or animals by reason of the excavation. We think the demurrer should have been overruled.

REVERSED.

LEWIS V. TILTON.

1 Practice in Supreme Court: DISMISSAL OF APPEAL UPON AFFIDAVITS. In order to determine an important right upon mere affidavits, the matter in controversy should not be left in doubt. Accordingly, this court will not dismiss an appeal on the ground that the matter in suit has been settled since the taking of the appeal, when the affidavits in relation to the fact of settlement do not fully satisfy the court that such settlement has been made.

Appeal from Wapello District Court.

FRIDAY, OCTOBER 19.

It appears from the record in this case that the defendants were members, and constituted the executive committee, of the "Ottumwa Temperance Reform Club." This organization was not an incorporated society or company, but was a mere voluntary association of persons. The executive committee of the club entered into a written contract with plaintiff, in the name of the club, for the lease of a hall for the use of the association. The club became delinquent in the payment of the rent of the hall, and owed a bill for gas. The plaintiff took an assignment of the bill for gas, and commenced

this action to recover of the defendants personally the amount due for rent and for gas. There was a demurrer to the petition, which was sustained, and the plaintiff appealed. The defendant submitted a motion to dismiss the appeal, upon the ground that the claim of plaintiff had been compromised and settled since the appeal.

Chambers & McElroy, for the motion.

W. H. C. Jaques, *contra*.

ROTHROCK, J.—C. D. Hendershott was counsel for the plaintiff in the court below, and had the principal management of the case. The defendants claim that, after the case was disposed of in the district court, they handed over to Hendershott certain subscriptions to the club, in compromise and settlement of the claim of the plaintiff, and that Hendershott accepted the same for the plaintiff and as a compromise, and collected part of the subscriptions for the plaintiff; that the plaintiff accepted and ratified this settlement, and is bound thereby. On the other hand, the plaintiff protests that he had no notice of any such an arrangement; that Hendershott had no authority to make such a settlement, and that he received no part of the subscriptions from Hendershott. A large number of affidavits have been filed by the parties, and every fact and proposition submitted in the motion is supported and contradicted by the affidavits. It is true, all parties concede that the subscriptions were turned over to Hendershott. The defendants claim that they were delivered to him for the plaintiff as a compromise of his claim. Hendershott claims that he received them for collection as the attorney of the defendants. There is no writing signed by any of the parties in regard to the matter in controversy. In this state of the record, we cannot dismiss the appeal. In order to justify the determination of an important right upon mere affidavits, the matter in controversy should not be left in doubt. It should clearly appear that appellant has no further

right to prosecute the appeal, in order to justify this court in thus disposing of the case. If this appeal should be prosecuted, and the judgment of the district court reversed, the defendants can then interpose any defense they have to the plaintiff's claim, whether it was before or after suit commenced, and such defense can be tried in the usual manner, by jury, and by an examination of witnesses in open court. It is also claimed that the appeal should be dismissed on account of the delay in its prosecution. This we think is sufficiently excused by the showing made by appellant.

MOTION OVERRULED.

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CURRY V. THE DISTRICT TOWNSHIP OF SIOUX CITY.

- 1 **Evidence:** BOND OF SCHOOL DISTRICT: SIGNATURE NOT DENIED UNDER OATH. Where the action was upon a bond purporting to have been issued by a school district, and the signature of the secretary of the district upon the bond was shown to be genuine, and the answer, though denying specifically the allegations of the petition, was not under oath; *held* that there was no error in admitting the bond in evidence.
2. **School District:** IS MUNICIPAL CORPORATION, AND MAY ISSUE BONDS AS SUCH. A school district is properly called a municipal corporation, according to the modern use of that term; and, as such, it may obligate itself by bonds issued under the provisions of chapter 93 of the acts of the Fourteenth General Assembly.

Appeal from Woodbury District Court.

FRIDAY, OCTOBER 19.

ACTION upon a bond for the payment of one thousand dollars, purporting to be issued by the defendant in satisfaction of a judgment against it. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

O. C. Tredway, for appellant.

L. S. Fawcett, for appellee.

Curry v. The Dist. Twp. of Sioux City.

ROTHROCK, J.—The defendant by its answer denied specifically nearly every allegation of the petition. Among other

1. EVIDENCE: defenses, it was denied that the bond was made
bond of school dis- and issued by the defendant. The answer was not
trict: signa- under oath. The plaintiff introduced evidence,
ture not de- from which it appears that there were certain judg-
nied under
oath.

ments against the defendant, and the bond recites that it was issued in satisfaction of a judgment. The signature of the secretary of the district township to the bond was shown to be genuine, and, as the bond is a written instrument for the payment of money, and the answer is not under oath, we think there was no error in admitting the bond in evidence. We make these statements in answer to certain objections made by defendant to rulings of the court pending the trial. We think none of the objections were well taken, and the contention between the parties upon the trial as to whether the plaintiff is a *bona fide* holder of the bond, and whether or not the defendant paid the interest on the bond until it became due, are wholly immaterial in the view we take of the case. The only material question in the case is, whether the defendant was authorized by law to issue the bond. It pur-
2. SCHOOL dis- ports upon its face to be issued under the provis-
trict: is muni- ions of chapter 87 of the Acts of the Four-
cipal corpora- teen General Assembly. That act contains the
tion, and may
issue bonds as
such.
following provisions:

“In case no property of a municipal corporation against which an execution has issued is found upon which to levy, or if the judgment creditor elect not to issue execution against such corporation, he is entitled to demand and receive of such debtor corporation the amount of his judgment and costs, either in the ordinary evidences of indebtedness issued by such corporation, or in bonds of such corporation, of such character as the parties may agree upon, and if the debtor issues no script, bonds, or other evidences of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment, with interest and costs, and when a tax has been so levied,

and the same, or any part thereof, has been collected, the treasurer shall, on demand, without an order from the board of supervisors, or warrant from the clerk thereof, pay the same to the creditor, or his attorney, taking a receipt therefor, and, if not demanded, may pay the same to the clerk of the court where the judgment was rendered, taking his receipt therefor, and if bonds shall be issued in payment of judgments as above provided, said bonds shall be issued in substantially the same form as is provided in chapter 54 of the Acts of the Thirteenth General Assembly of the State of Iowa, entitled 'An act to provide for the funding of county indebtedness, and for the payment thereof,' and said bonds shall draw interest at a rate not to exceed 10 per cent., and both principal and interest shall be and become due and shall be payable in the same time and manner as provided for in said chapter, and if not paid when due, the same may be deposited with the auditor of state, who shall take the same steps for the payment of said bonds, with the interest thereon, as is provided in said chapter 54 aforesaid."

The bond is in substantially the same form as provided in chapter 54 of the Acts of the Thirteenth General Assembly. Whether or not the provision of said last named act, authorizing the deposit of bonds with the state auditor, and the levy of a tax in the manner therein provided, can be complied with as to bonds issued by a city or school district corporation, we need not determine. The question we are required to determine is, whether or not the defendant had the lawful authority to issue the bond. The statute enacts that a "*municipal corporation*," may issue bonds as provided therein, and the whole controversy turns upon the question whether, within the meaning of the statute, a school district township may properly be called a municipal corporation. The word "municipal," as originally used in its strictness, applied to cities only. But the word now has a much more extended meaning, and when applied to corporations the words "political," "municipal," and "public," are used interchangeably. A

Maish v. Littleton, Sheriff.

municipal corporation is defined to be "a public corporation created by government for political purposes, and having subordinate and local powers of legislation; *e. g.* a county, town, city, etc." Bouvier's Law Dic.; and see *Winspear v. The District Township of Holman*, 37 Iowa, 542, and *Iowa Railroad Land Co. v. Carroll County*, 39 Id., 151. We think the statute in question empowered district townships to issue bonds.

AFFIRMED.

MAISH V. LITTLETON, SHERIFF.

1. **Replevin against Sheriff:** SUBSTITUTION OF ATTACHING CREDITOR: STATUTE UNCONSTITUTIONAL. Where a sheriff levies upon personal property under a writ of attachment, and the owner of the property replevies it, the attaching creditor cannot be substituted as defendant in place of the sheriff, and the sheriff discharged, under sections 2572, 2573 and 2574 of the Code. Said sections, so far as they provide for such substitution, are unconstitutional. *Sunberg v. Babcock*, 61 Iowa, 601, followed.

Appeal from Polk Circuit Court.

FRIDAY, OCTOBER 19.

ACTION in replevin. The defendant is the sheriff of Polk county. As such, he received a writ of attachment in an action brought by H. B. Claflin & Co. against W. K. Bird, and levied the same upon certain personal property. The plaintiff claims to be the owner of the property, and entitled to the immediate possession. Under such claim, he brought this action to recover possession, and for damages. The defendant, Littleton, and the attaching creditors, H. B. Claflin & Co., made an application to the court for the substitution of H. B. Claflin & Co. as defendants, in the place of Littleton. This application the court overruled, and from the order overruling the same the defendant appeals.

Brown & Dudley, for appellant.

Wright, Cummins & Wright, for appellee.

ADAMS, J.—The application for substitution was made under sections 2572, 2573 and 2574 of the Code.

The substitution asked for contemplated, of course, the discharge of Littleton. If he had become liable to the plaintiff, as the petition avers, the plaintiff had a claim against him which was in the nature of property. The discharge of Littleton would have had the effect to deprive the plaintiff of this property. He insists, therefore, that the statute providing for the substitution of the creditor and discharge of the officer is unconstitutional. The question raised was decided in *Sunberg v. Babcock, Sheriff*, 61 Iowa, 601. It was held in that case that the statutory provision for the substitution of the creditor and discharge of the officer was unconstitutional. Following that case, we have to say that the judgment of the circuit court must be

AFFIRMED.

STATE V. KEGAN.

1. **Indictment: ROBBERY.** An indictment which charges that the defendant made an assault upon one L., "and with force and violence unlawfully and feloniously did steal, take and carry away from the person of the said L. four \$20 bills," etc., sufficiently charges the crime of robbery.
2. **Criminal Practice: INSTRUCTIONS AS TO OFFENSES INFERIOR TO THE ONE CHARGED.** Where a person is charged with a crime which in its nature includes inferior offenses, and the evidence is such that the jury might find the defendant guilty of an inferior offense, the court should so instruct as to enable the jury to find according to the evidence.

Appeal from Clinton District Court.

FRIDAY, OCTOBER 19.

THE defendant was indicted for the crime of the robbery

of one Sam Lee. Verdict and judgment were rendered against him, and he appeals to this court.

J. S. Darling and *A. R. McCoy*, for appellant.

Smith McPherson, Attorney-general, and *H. H. Benson*, for the State.

ADAMS, J.—I. The defendant moved in arrest of judgment, on the alleged ground of the insufficiency of the indictment. It is urged that the indictment fails to show that the assault was feloniously made, and fails to show that the money was carried away with the felonious intent to permanently convert the same, and fails to show that the money was taken without Lee's consent.

The indictment charges that the defendant made an assault upon Sam Lee, "and with force and violence unlawfully and feloniously did steal, take and carry away from the person of the said Sam Lee four \$20 bills," etc.

In our opinion the objections are not well taken. Whoever with violence feloniously steals and takes money from the person of another, makes a felonious assault, and converts the money without the consent of the owner, and commits the crime of robbery.

II. The court instructed the jury that, if they should find the defendant guilty, the form of their verdict would be, "We, the jury, find the defendant guilty." The jury rendered their verdict in this form. The meaning of the verdict was, of course, that the defendant was guilty of robbery as charged. The evidence tends strongly to show that the defendant was not guilty of robbery, but was guilty of an assault and battery, either with or without an intent to commit robbery. Where a person is charged with a crime which in its nature includes inferior offenses, and the evidence is such that the jury might possibly find the defendant guilty of one of the inferior offenses, the court should instruct in regard to such inferior offenses, and allow the

 State v. Graham et al.

jury to find according to the evidence. *State v. Walters*, 45 Iowa, 390; *State v. Vinsant*, 49 Iowa, 244; *State v. Glynden*, 51 Id., 463; *State v. Clemons*, Id., 278.

The court below appears to have given no instruction in regard to the inferior offenses necessarily included in the crime of robbery. We think it should have done so, at least so far as there was any ground in the evidence, and the jury should have been allowed to find according to the evidence. The case must be remanded for another trial.

REVERSED.

STATE V. GRAHAM ET AL.

1. **Larceny: PRESUMPTION FROM BAD ASSOCIATION OF DEFENDANTS:** INSTRUCTION. Where, on an indictment for the larceny of money from the person of the prosecuting witness, there was evidence tending to show that the house where the larceny was committed was a house of ill-fame, and that one of the defendants, against whom the evidence of guilt was strong, was the keeper of the house, and that the other defendants were inmates thereof, it was error to give the jury an instruction from which they might infer that, because the defendants may have been partners in the crime of keeping a house of ill-fame, they might be presumed to be guilty together of the larceny committed therein.
2. **Criminal practice: MISCONDUCT OF DISTRICT ATTORNEY.** Courts should hold district attorneys to a strict observance of the statute which forbids them to refer to the fact that a defendant has not testified on his own behalf; and for a violation of the statute a judgment of conviction will be reversed.

Appeal from Marshall District Court.

FRIDAY, OCTOBER 19.

THE defendants, Alexander Graham, Sophia Graham, John Dames, and Hattie Dillon were indicted for the crime of larceny. Verdict and judgment were rendered against them. Alexander Graham and John Dames were sentenced to the penitentiary for ten years, Sophia Graham for six years, and Hattie Dillon for two years. They all appeal.

Sutton & Childs and Graham & Cady, for appellant.

Smith McPherson, Attorney-general, for the State.

ADAMS, J.—The defendants were charged with stealing seven hundred dollars from one Hilderbrand. The evidence shows that Hilderbrand is a resident of Boone; that in April, 1882, he visited Marshalltown, where he remained two or three days; that while he was there he was much of the time in a drunken debauch; that, meeting the defendant, Alexander Graham, with whom he was previously acquainted, he was invited by him to go to his house, and accepted the invitation; that the next day, which was Sunday, he visited Graham's house again, and took dinner; that before he left Graham's he became intoxicated, and lay down on a bed with his boots on; that afterward he was induced to lie on a sofa. Afterward, according to his testimony, Graham pulled him from the sofa, jerked him upon his feet, and told him in a rough manner to go home. From Graham's he went to a hotel. Upon reaching there he looked in his pocket for his money, and says that he missed seven hundred dollars. There was evidence tending to show that the Grahams had formerly kept a saloon, and that their house, where the larceny is alleged to have been committed, had the reputation of being a house of prostitution.

I. The court instructed the jury that they might consider "the habits of the parties defendant at the time, whether they were living together, acting together, or together were engaged in a common purpose to take Hilderbrand's money, if any was taken." The giving of this instruction is assigned as error. If the prosecuting witness is to be believed, the money was taken from him, while lying in a state of intoxication, by Graham, and by no one else. He said: "Mr. Graham came to where I was lying, and unbuttoned my coat, and took out my pocket-book. I remember when Mr. Graham came back with the pocket-book

1. LARCENY:
presumption
from bad as-
sociation of
defendants:
instruction.

and put it into my coat pocket. I lay there some half hour after that, until Mr. Graham took hold of me. I got on my feet then and we went down stairs." The defendant, Hattie Dillon, was an inmate of the house. But upon what ground she was convicted we are unable to discover. The prosecuting witness, it is true, in his examination in chief, testified that, before his pocket-book was taken by Graham, she came to him while he was in a state of intoxication, and tried to unbutton his coat, but was not successful. But on cross-examination he testified that the only thing which she did was to take hold of his coat and tell him to get off of the bed. No act of hers, then, is proved but that. A verdict must, we think, have been found against her upon the ground that she was living with the Grahams, and that the house had the reputation of being a house of prostitution. The court instructed the jury that they might consider whether the defendants were living together, and what their habits were. We think that the court erred in this instruction, and that it resulted in the conviction of at least one person against whom there was no legitimate evidence whatever. If the larceny was committed by any of the defendants, (of which there is some doubt,) it was beyond question committed by Alexander Graham. Now, where a larceny is proved to have been committed by the proprietor of a house of ill-fame, the other inmates of the house cannot be convicted of the same crime merely upon the ground that they were living with the proprietor, and were addicted to bad habits. We ought, perhaps, to say, in this connection, that the defendants introduced no evidence of good character. The instruction, therefore, could not properly have been given upon the theory that they had. It seems to have been given merely for the purpose of connecting them together. But it does not follow that the defendants were partners in the crime with which they are charged, because they may have been partners in a different crime with which they are not charged.

II. The defendants moved for a new trial on the ground

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of the misconduct of the district attorney. The defendants, Alexander Graham and Dames, testified on the trial, but the other defendants did not. The defendants filed the affidavit of Mr. W. O. Childs, in which he states that "the district attorney, in his speech to the jury, referred to the fact that some of the defendants had not testified, and said if they had testified they would probably have testified the same as Graham did." They also filed the affidavit of one Wallace, in which he states that he was one of the jury in the cause, and that the district attorney, in his speech to the jury, referred to the fact that some of the defendants had not testified. The state then filed the affidavit of the district attorney, in which he states that, in his address to the jury, he said "it was not fair to presume that Sophia Graham and Hattie Dillon remembered the facts of this case as testified by Alexander Graham and John Dames, and it is not fair to presume anything not testified to." It seems to be undisputed that the district attorney did refer to the fact that a part of the defendants had not testified. There is indeed no conflict between the affidavits. Taking all the affidavits to be true, it appears to us that the district attorney must have claimed, in substance, that, while Sophia Graham and Hattie Dillon were guilty, and knew that Alexander Graham and Dames had testified falsely, and while they would probably themselves have testified falsely if they had testified at all, they had not testified, and, therefore, no testimony of theirs was in the case. The statute is explicit that the district attorney shall not refer to the fact that the defendant did not testify in his own behalf. There is nothing which he can say about the fact that will justify a reference to it, and courts should hold district attorneys to a strict observance of their duty in this respect. We think the court erred in not sustaining the motion for a new trial. The case must be remanded for another trial.

REVERSED.

HARRIS & ROBERTS v. MORGAN.

1. **Verdict: EVIDENCE TO SUPPORT.** Where the evidence is conflicting, this court will not reverse a cause on the ground that the verdict is not sustained by the evidence.

Appeal from Cass Circuit Court.

FRIDAY, OCTOBER 19.

THIS is an action to recover damages for an alleged failure of the defendant to deliver 3,000 bushels of corn in compliance with a written contract. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

Frank J. Macomber and Willard & Hopper, for appellant.

A. S. Churchill, for appellee.

ROTHROCK, J.—The written contract in question is in these words:

“LEWIS, Iowa, 2—26, 1881.

“Received of B. P. Lewis the sum of twenty-five dollars in part payment of three thousand bushels of dry, sound, shelled corn, free from dirt and ice, in township of Cass, county of Cass, State of Iowa, which I have this day sold them for twenty-five cents per bushel, delivered in our bins at Lewis Station on the C., R. I. & P. Railroad, to be delivered in May or June, by giving me ten days’ notice, before delivering, and I hereby guarantee that there are no liens nor encumbrances of any name or nature on the above described corn.

“HENRY MORGAN.”

The plaintiffs claim that they purchased the contract of Lewis, and thereby became entitled to receive the corn from the defendant. That after the contract was executed the time for delivery was extended to the month of August, 1881, and that defendant delivered three hundred and forty-seven

bushels of corn on said contract, and, notwithstanding plaintiffs gave defendant notice about August 15th to deliver the corn, he failed and refused to deliver any of it, except that above stated. It is alleged that at the time of the breach of the contract corn of the quality described in the contract was worth forty-five cents a bushel, and judgment was demanded for the difference between that amount and the contract price. The defendant admitted that he executed the written contract, but denied that the time for the delivery of the corn thereunder had ever been extended, or that any change had ever been made in the terms of the contract. He denied that he had delivered any corn under the contract, and averred that he was at all times during May and June ready to deliver the corn according to his agreement, but that neither plaintiffs nor Lewis notified the defendant to deliver the same until long after the expiration of the contract. The answer also contained a general denial of every allegation of the petition which was not admitted.

The court instructed the jury that under the contract, if the time of performance was not extended, the defendant had all of the months of May and June in which to deliver the corn, and that he was bound to deliver it, even if the plaintiffs failed to give the ten days' notice provided for in the contract, and that, if he failed to deliver it, and the market value of corn was more than the contract price on the last day of June, he was liable in damages for the difference. No complaint is made of the instructions. But it is claimed that the verdict was contrary to the instructions and contrary to the evidence. A material fact in controversy between the parties was whether the time for the delivery of the corn was extended. There is a conflict in the evidence on this question, and such a conflict as forbids us from interfering with the finding of the jury thereon. The evidence shows that on the last day of June corn was worth two cents a bushel more than the contract price. Plaintiffs claim that they paid the defendant on the contract the

Wire v. Foster.

sum of eighty-five dollars, in addition to the twenty-five dollars mentioned therein. The defendant denies the payment of the eighty-five dollars, and, under the evidence, the jury may fairly have found that the payment was not made. The plaintiffs concede that defendant delivered 347 bushels of corn to them, and claim that it was delivered under the contract. The defendant denies that he delivered it under the agreement, but claims that the transaction was a sale at the market price. The defendant has not been paid for this corn. If the time for the delivery of the corn was not extended, the plaintiffs are more than paid for all the damages to which they are entitled. They do not claim that the defendant has been paid for the corn he delivered. In this view of the case, the verdict was substantially a fair adjustment of the controversy between the parties. It is true, the delivery of part of the corn was not pleaded by the defendant as a counterclaim, but the plaintiffs admitted that it was received by them, and they claim that they received it on the contract. If it was so delivered, or in any event, they should not be allowed to retain it without accounting for it to the defendant. We think that substantial justice has been administered to the parties, and that there is no prejudicial error in the record.

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129 483**WIRE V. FOSTER.**

1. **Sale of Corn to be Delivered: ACTION FOR NON-DELIVERY: DEMAND AND TENDER.** Before one can recover damages for the non-delivery of corn contracted for, where no part of the price has been paid, he must tender the contract price and demand the corn.
2. ———: ———: **MEASURE OF DAMAGES.** Where defendant sold and agreed to deliver to plaintiff at his farm a few miles from S. certain corn, to be paid for when delivered, at the market price, *held* that, since the law presumes that plaintiff could have gone into the market and bought the corn at the market price, he was not damaged by defendant's failure to deliver, (*Boies v. Vincent*, 24 Iowa, 387,) and the fact that the quantity of corn contracted for was not in the market at S. at the time fixed for delivering is not material.

 Wire v. Foster.

3. **Practice in Supreme Court: NO REVERSAL FOR NOMINAL DAMAGES.** Where an error on the trial of a cause works only nominal damages to appellant, a reversal will be denied. *Watson v. Van Meter*, 43 Iowa, 76, followed.
4. ———: **CAUSE REVIEWED AS TRIED BELOW.** Where in the court below the defendant filed an answer denying each allegation of the petition, and afterwards the plaintiff amended his petition, and the court and the parties agreed in considering the denials of the answer as applying to the amendment as well as to the original petition, this court will also regard the allegations of the amendment as being put in issue by the answer, though no additional answer was filed.

Appeal from Buena Vista Circuit Court.

FRIDAY, OCTOBER 19.

ACTION to recover for hay wrongfully converted by the defendant to his own use, and to recover damages by reason of the defendant's failure to deliver corn as he contracted to do. Trial by jury, verdict and judgment for the defendant, and plaintiff appeals.

Robinson & Milchrest, for appellant.

Gregory & Bailie, for appellee.

SEEVERS, J.—I. The undisputed evidence shows that the defendant agreed to sell to the plaintiff some corn, then on a farm, at the market price. The evidence was conflicting as to the quantity of corn, but the plaintiff testified that he purchased three hundred bushels. No part of the purchase money was paid when the contract was entered into. There was evidence tending to show that the contract price was the market value of corn at Storm Lake. The place of delivery was several miles distant from Storm Lake, and the evidence tended to show that it was worth three or four cents per bushel to haul corn from Storm Lake to the farm. If there was any evidence tending to show the value of corn at the place of delivery at the time the tender and demand were made, we have been unable to

1. SALE of corn to be delivered: action for non-delivery: demand and tender.

Wire v. Foster.

discover it. Before the plaintiff could maintain an action for the corn, or rather before he was entitled to damages because of its non-delivery, it was incumbent on him to tender the contract price and demand the corn. He claims that he did this. But the court in substance instructed the jury

2. —:—: that, as the contract price was the market price,
measure of damages. the plaintiff was not damaged by the defendant's

failure to deliver the corn; and this we understand to be the rule adopted in this state. *Boies v. Vincent*, 24 Iowa, 387. Counsel for the appellant concedes this, but he insists that the rule is based on the thought that the party can go into the market and purchase at the market price, and that, therefore, he is not damaged; but that the rule does not apply where, as in this case, as the plaintiff claims the evidence tended to show, the quantity of corn contracted for could not be had at the place designated—that is, at Storm Lake. We think this immaterial. The plaintiff was required to tender the contract price before he could maintain an action for damages. If he did this, it necessarily follows that he was not damaged by the failure to deliver the corn, for he was compelled to tender the same amount of money that would be required to go into the market and purchase the corn. While the evidence tended to show that it was worth three or four cents per bushel to transport the corn from Storm Lake to the farm, the evidence, as we have stated, fails to show what corn was worth at the farm. It may have been worth less than in Storm Lake. But if the plaintiff is entitled to recover the price of hauling, his recovery would be for a nominal amount, and we have declined to reverse, where the error involved no more than nominal damages. *Watson v. Van Meter*, 43 Iowa, 76. We believe the instruction to be correct, and, for the reasons stated, the court did not err in sustaining the demurrer to the first amendment to the petition.

II. The issue as to the hay, with the exception to be

3. PRACTICE
in supreme
court: no re-
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Wire & Foster.

presently stated, was fairly submitted to the jury, and on
4. ———: such issue they have found for the defendant.
cause review-
ed as tried be-
low. We deem it sufficient to say that we cannot dis-
turb the finding. The first count in the petition seeks to re-
cover for a conversion of the hay, and the fifth count alleges
that a portion of the hay was converted to the defendant's
use, and the remainder so left that it was utterly ruined by
the storms. Counsel for the appellant say that no answer
was filed to the fifth count. If this be so, no default was
asked or entered. But we understand the answer to deny
each allegation in the petition. The fifth count to the peti-
tion was filed after the answer, but it is evident that the par-
ties and the court regarded the answer as putting in issue all
the allegations of the pleadings filed by the plaintiff. This
question was not raised below, and must be disregarded in
this court. Appellant further says that the court failed to
instruct the jury as to the issue presented by the fifth count.
A portion of the eleventh instruction is as follows: "If you
believe that the hay belonged to the plaintiff, and that the
defendant converted only a portion of it, but left the balance
in such shape that it rotted and was rendered worthless, then
he is liable for the value of the whole stack, although he may
have taken only a part of the stack." It is evident that
counsel overlooked this part of the instruction.

AFFIRMED.

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
DES MOINES, DECEMBER TERM, A. D. 1883.

IN THE THIRTY-SEVENTH YEAR OF THE STATE.

PRESENT:

HON. JAMES G. DAY, CHIEF JUSTICE.	
" JAMES H. ROTHROCK,	} JUDGES.
" JOSEPH M. BECK,	
" AUSTIN ADAMS,	
" WILLIAM H. SEEVERS,	

SMITH ET AL V. SHAY ET AL.

1. **Redemption: RIGHT OF AS BETWEEN JUNIOR AND SENIOR MORTGAGEES.** Where B. mortgaged land to defendant, and afterward mortgaged the same land to plaintiffs, and defendant, under a foreclosure of his mortgage, to which plaintiffs were not made parties, procured a deed to the land, and afterwards plaintiffs, under a foreclosure of their mortgage, to which defendant was not made a party, also obtained a deed to the land, *held* that, while plaintiffs' right, as junior mortgagees, to redeem from the senior mortgage, was not cut off by the foreclosure of the senior mortgage, yet that right was not absolute, but that defendants could prevent the exercise of that right by themselves redeeming from the junior mortgage, by paying, not merely the amount for which the land sold on the foreclosure of the junior mortgage, but the amount of plaintiffs' judgment against B. upon the junior mortgage debt.

Appeal from Shelby District Court.

TUESDAY, DECEMBER 4.

THIS is an action in equity for the redemption of lands sold under the foreclosure of a mortgage. The facts are as follows: On the 11th day of September, 1874, Daniel Burns executed to the defendant, Walter Shay, a mortgage on the lands in controversy. In June, 1878, said Burns executed to plaintiffs a mortgage on the same lands. The defendant, Shay, foreclosed his mortgage by an action in the United States circuit court, and on the 11th day of February, 1880, obtained a master's deed to said lands, in pursuance of such foreclosure. Plaintiffs were not made parties to such foreclosure suit. The plaintiffs foreclosed their mortgage by an action in the district court of Shelby county, Iowa, to which action Shay was not made a party. On the 12th day of February, 1880, one day after the date of the master's deed to Walter Shay, the sheriff of Shelby county executed to plaintiffs a sheriff's deed to said lands. March 1, 1880, defendant, Shay, made a contract with the defendants, Frank & Elmendorf, giving them the right to lease or sell said lands, by which they were to have an interest in the proceeds thereof if they effected a sale. March 25, 1881, Frank & Elmendorf sold said lands to Thomas Jones, who now claims to be the owner thereof.

On the 26th day of April, 1881, Smith & Crittenden deposited with the clerk of the circuit court of the United States the sum of \$1,380.15, for the purpose of redeeming said land from the sale under the Shay foreclosure, but withdrew said deposit on the 22d day of July, 1881. On the 16th day of July, 1881, and before the plaintiffs had taken up the money so deposited with said clerk, they commenced this suit to redeem said land.

The defendants, Jones and Frank & Elmendorf, filed an answer, in which they ask that they may be allowed to redeem

from the plaintiffs' mortgage. The court decreed that the defendants, Thomas Jones and Frank & Elmendorf, be allowed to redeem said premises by paying into the hands of the clerk, on or before October 1, 1882, the sum of \$1,131.10, with interest from the date of the decree at the rate of ten per cent, and that, if the defendants fail to make such redemption within the time named, the plaintiffs may redeem, by paying to the clerk for the use of defendants, on or before November 1, 1882, the sum of \$1,125, with interest from August 22d, 1882, the date of the decree, at ten per cent. Both parties appeal.

Hart & Brewer, for plaintiffs.

Stuart Bros. and D. O. Stuart, for defendants.

DAY, CH. J.—I. The plaintiffs hold and claim under the junior mortgage. They were not made parties to the foreclosure suit of the Shay or senior mortgage. It is conceded by the defendants that their right of redemption was not barred by the decree and sale under the senior mortgage. It is claimed, however, that their right to redeem is not an absolute one, and that defendants can prevent the exercise of that right by themselves redeeming from plaintiffs. This view was adopted by the court below, and it is, we think, correct. In 2d Jones on Mortgages, 2d Ed., section 1075, it is said: "A junior incumbrancer, who, not having been made a party to a foreclosure of a prior mortgage, afterwards redeems, redeems not the premises, strictly speaking, but the prior incumbrance, and he is entitled, not to a conveyance of the premises, but to an assignment of the security. Therefore, if the prior mortgagee in such case has become the purchaser at the foreclosure sale, and has thus acquired the equity of redemption of the mortgaged premises, the junior mortgagee upon redeeming is not entitled to a conveyance of the estate, but to an assignment of the prior mortgage; whereupon the prior mortgagee, as owner of the equity of redemption, may, if he

choose, pay the amount due upon the junior mortgage, redeeming that." See also *Pardee v. Van Anken*, 3 Barb., 534; *Renard v. Brown*, 7 Neb., 449. In our opinion the court did not err in giving the defendants the paramount right of redemption.

II. The court fixed the amount which the plaintiffs should pay to redeem at \$1,125. Of this both parties complain. The plaintiffs insist that the amount is too large, and the defendants that it is too small. From a careful review of the whole case, we find that the amount which plaintiffs should pay is \$1,350.97, with interest from August 22, 1882, on all of this sum, except \$334.39, at ten per cent, and upon \$334.39 at the rate of six per cent. The defendants complain of the amount which the court required them to pay in order to effect redemption. They insist that they should pay only the amount for which the land sold. We think that the court correctly required them to pay the amount of the judgment against Burns. The defendants will be allowed to redeem by paying into the hands of the clerk of this court, for the use of plaintiffs, the sum \$1,131.10, with interest from August 22, 1882, at ten per cent, within sixty days from the entering of decree in this court. If the defendants fail to make such redemption, the plaintiffs may redeem by paying to the clerk for the use of defendants the sum of \$1,350.97, with interest as above indicated, within ninety days from the rendition of decree. •

The plaintiffs will pay the costs of appeal. With the modification above indicated, the judgment is

AFFIRMED.

NEWELL V. PENNICK ET AL.

62	133
94	502

1. **Redemption from Judicial Sale: RIGHT OF AS BETWEEN JUNIOR AND SENIOR LIEN-HOLDERS: STATUTORY AND EQUITABLE RIGHT.** A junior lien-holder has no right under the statute to redeem property sold at judicial sale after nine months subsequent to the date of sale; but where the sale was under the foreclosure of a mortgage, to which the junior lien-holder was not made a party, he had the right in *equity* to redeem from the sale, and the mortgagee, who was the purchaser at the foreclosure sale, had the right also to redeem from the junior lien-holder, by paying him the amount upon which his claim was based.

Appeal from Lucas District Court.

TUESDAY, DECEMBER 4.

ACTION IN EQUITY. Judgment for plaintiff, and defendants appeal.

Stuart Bros. and Mitchell & Pennick, for appellant.

Perry & Townsend, for appellee.

SEEVERS, J.—In 1878, one Scott and wife executed a mortgage on real estate, which was duly foreclosed, and a special execution issued, under and by virtue of which the plaintiff, on the twenty-second day of October, 1881, became the purchaser of the real estate, subject to the right of redemption.

In 1879, one Brown recovered a judgment against Scott, which was a lien on the real estate, junior to that of the mortgage.

Brown was not made a party in the action brought to foreclose the mortgage. On the twenty-third day of October, 1882, the defendant, Pennick, was the owner of the Brown judgment, and on that day sought to make statutory redemption from the plaintiff by paying the required amount of money to the clerk. The sheriff recognized such right, and conveyed the premises to Pennick.

On the twenty-seventh day of October, 1882, the plaintiff

presented his certificate of purchase to the sheriff and demanded a deed, which he refused to execute, because of the redemption by and conveyance to Pennick, as above stated. On the same day the plaintiff tendered to Pennick the amount due on the Brown judgment, and paid the same to the clerk for his use.

This action was brought to set aside the conveyance to Pennick, to set aside the redemption proceedings, and compel the sheriff to execute a conveyance to the plaintiff. The relief asked by the plaintiff was granted, but Pennick was allowed to recover the money paid the clerk on the Brown judgment.

The important question discussed by counsel is, whether Pennick had the right to make statutory redemption at the time he did. The appellant, in support of such right, cites Code, § 3321; *Jones v. Hartsock*, 42 Iowa, 147; *Wright v. Howell*, 35 Id., 288; *Montgomery v. Chadwick*, 7 Id., 114; *Ten Eyck v. Casad*, 15 Id., 524; and *Johnson v. Harmon*, 19 Id., 56.

We understand that the right of a junior lien-holder, not made a party to the foreclosure of a mortgage, to make statutory redemption therefrom within nine months after a sale of the premises under the foreclosure proceeding, is conceded. It is only his right to do so after that period which is denied, and this position was affirmed by the court.

None of the cases above cited have reference to statutory redemption. But some or all of them hold that a junior lien-holder, not made a party to the foreclosure proceeding, may redeem in equity after the statutory period has expired.

Section 3321 of the Code simply declares that the right to make redemption from the foreclosure of a mortgage, and a sale thereunder, exists, and may be exercised in the same manner as sales of real estate under general execution on judgments at law.

Statutory redemption must be made, it is obvious, within

Thomas v. Hoffman, Garnishee.

the time and in the manner prescribed by statute. The defendant in execution may redeem within one year from the sale. This right for the first six months is exclusive, but if he fails to exercise such right, then any creditor may redeem at any time after six and within nine months after the sale. Unless the defendant in execution redeems within twelve months after the sale, the purchaser is entitled to a conveyance. Code, § § 3102 and 3103.

There is no provision of the statute which authorizes a creditor or lien holder to redeem after the expiration of nine months from the sale of the real estate. As the defendant did not make redemption until after that period had expired, what he did was without legal force or effect, and the court correctly set aside the same, and the conveyance based thereon. The right, however, of Pennick to make redemption in equity existed, and if this proceeding is regarded as a proper exercise of such right, then the plaintiff in equity could redeem from him. This the plaintiff in substance did by paying the amount of the judgment on which Pennick's right is based.

AFFIRMED.

THOMAS V. HOFFMAN, GARNISHEE.

HOFFMAN V. THOMAS ET AL.

SIGLER V. HOFFMAN, GARNISHEE

HOFFMAN V. SIGLAR ET AL.

1. **Garnishment:** NOTICE TO GARNISHEE OF TIME AND PLACE OF ANSWERING. Where a commissioner is appointed to take the answer of a garnishee, and the court does not fix the time and place when and where the answer is to be taken, the commissioner should fix such time and place, and give the garnishee notice thereof.

62	125
129	150

Thomas v. Hoffman, Garnishee.

2. ———: ———: JUDGMENT WITHOUT NOTICE INVALID. In such case, where the garnishee had no notice of the time and place when and where his answer was to be taken, and the commissioner reported that he had failed to appear and answer, and the plaintiff thereupon moved for judgment against him, and the court rendered judgment accordingly, *held* that such judgment was invalid, and that the court below erred in overruling a motion to vacate the judgment, and in dissolving an injunction issued to enjoin the collection of the judgment by execution.
3. Practice in Supreme Court: ASSIGNMENT OF ERROR. Where it was assigned as error that the court erred in overruling a motion to vacate a judgment on the ground of irregularities, although several of these irregularities were specified as grounds of the motion, yet as only one ground was relied on, the assignment was sufficiently specific.
4. Garnishment: JUDGMENT WITHOUT NOTICE: MOTION TO VACATE. A motion to vacate a judgment rendered against a garnishee for failure to answer, when he had no notice of the time and place when and where his answer was to be taken, might be made after the term at which the judgment was rendered.

Appeals from Adams District Court.

TUESDAY, DECEMBER 4.

THE cases are submitted together as involving the same questions of law. Sigler and Thomas are creditors of one Parsons. Each, having a judgment against him obtained in the district court of Adams county, caused an execution to issue, and caused Hoffman to be garnished. The garnishee answered to the officer serving the notice, showing no indebtedness, and in addition thereto appeared at the next term of court, to-wit, the October term, 1882. The attorneys for the garnishing creditors did not see fit to examine him in court, but caused a commissioner to be appointed to take his answer in each case. No time or place, however, was fixed in the order of appointment for the examination, and no notice by the commissioner of the fixing of any time or place for the examination was served upon the garnishee. Eight days after the commissioner was appointed, he made a report that the garnishee had failed to appear and answer. The garnishing creditors then moved to strike from the files the

answers made by the garnishee to the officer, and moved for judgment against him for failure to appear before the commissioner, as shown by his report. The court sustained the motions, and ordered that an absolute judgment be rendered against the garnishee in each case, and that an execution issue against him. The fact of the rendition of such judgments did not come to the garnishee's knowledge until after the expiration of the term at which they were rendered. When the fact did come to his knowledge, he filed a motion in each case to vacate the judgment. An execution having in the meantime issued in each case, he filed two petitions in equity, asking for an injunction to restrain the executions. Writs of injunction were issued, but the garnishing creditors filed motions to dissolve the injunctions. The garnishee's motions to vacate the judgments were overruled, and the creditors' motions to dissolve the injunctions were sustained. The garnishee appeals in each case.

Anderson & Towner and Deacon & Smith, for appellant.

R. A. Moore, for appellees.

ADAMS, J.—Where a commissioner is appointed to take the answer of a garnishee, and the court does not fix the time and place for the answer to be taken, it is to be inferred that the intention of the court was that the commissioner should fix the time and place. This the commissioner may do by serving a notice on the garnishee of the time and place at which he is to answer. We know of no other way in which the time and place could properly be fixed by the commissioner. He could not do it by a mere mental determination, nor by making a record of the same in his office, or elsewhere. A record made at a time and place not known to the law is not binding upon any one.

No notice having been served upon the garnishee in these cases of any time or place fixed by the commissioner for tak-

ing his answers, he was not, we think, in fault for not giving his answers.

The commissioner was guilty of an irregularity, therefore, in reporting to the court that the garnishee had "failed to appear." While it was true, in one sense, perhaps, that the garnishee had failed to appear, it was not true in any proper sense, and not true in the sense in which the court probably understood it. We do not know that it was the intention to mislead the court, but we have no doubt that the report did mislead it. This irregularity was consummated by the appellees by moving for judgment against the garnishee for failure to appear and answer. We are clear that the judgments in these cases ought not to stand. Code, § 3154.

We have reached this conclusion independent of the fact that the garnishee answered to the officer. His answers were stricken from the files, and perhaps properly, because the officer was not directed to take his answers.

The right to injunctions to restrain the executions depended upon the validity of the judgments. The injunction cases were very properly submitted with the cases in which the judgments were obtained. The conclusion which we have reached necessarily disposes of the injunction cases in the appellant's favor.

What we have said thus far pertains to the merits of the cases. The appellees, however, urge some technical objections which demand a brief consideration.

It is insisted that the errors assigned are not sufficiently specific.

One of the errors assigned is that the court erred in overruling the motion of the garnishee to vacate the judgment. The motion was based upon the alleged ground that the judgment was obtained through irregularity. No other ground is relied upon. It is true that the garnishee specifies more than one thing in which the alleged irregularity consisted; yet as he relied upon one statutory ground, we think that it was sufficient to assign as error that the court erred in overruling the motion.

It is further insisted that the motion should have been filed at the time at which judgment was rendered; and in support of the position the appellees cite *Scamahorn v. Scott et al.*, 42 Iowa, 529. But in that case the garnishee had failed to obey the order of court. In the case at bar the alleged failure was that the garnishee did not appear before the commissioner. But, as we have seen, that was in no proper sense a failure, no time or place for his appearance having been fixed so that he could appear. In all the actions the judgment of the district court must be

REVERSED.

QUINN ET AL V. SHIELDS ET AL.

1. **Will: DEVISE TO CHARITABLE CORPORATION: COMPETENCY OF CORPORATOR AS WITNESS.** One of the original corporators and continuing members of a charitable corporation is a competent witness to a will whereby real and personal property is devised and bequeathed to the corporation, notwithstanding such witness may have a contingent interest in the property of the corporation upon its possible dissolution.
2. **Corporation: WHETHER FOR CHARITY OR FOR PROFIT.** The articles of incorporation of "The Sisters of the Humility of Mary, Ottumwa, Iowa," considered, and the said corporation *held* to be one for charitable purposes, and not for the pecuniary profit of the corporators.
3. **Will: DEVISE TO CORPORATION: ILLEGAL CORPORATE ORGANIZATION.** A bequest is included within the proper definition of the term "contract;" and when the will is admitted to probate, it is to be regarded as a contract of record. It follows, under section 1089 of the Code, that, when a corporation seeks to enforce a bequest in a will duly admitted to probate, its claims cannot be resisted on the grounds that it has not been legally organized; and it makes no difference that the corporation is defendant in the action, and is seeking to maintain the bequest against the assaults of the plaintiffs, who are urging against the validity of the bequest the want of legal organization in the corporation.
4. —: **DEVISE FOR LIFE: DISPOSITION OF REMAINDER BY WILL OF DEVISEE.** It is competent for a testator to give by will to a friend personal and real property, to be by him enjoyed during his natural life, with a provision that what remains at his death shall not descend to his heirs, but shall be devised by him "to the support and management of

62	129
93	103
62	129
118	245
62	129
121	85
121	88
62	129
133	725
62	129
135	115

Quinn et al. v. Shields et al.

such worthy and meritorious charitable and educational and religious institutions of the Roman Catholic faith" as the said friend may determine, and such gift will not be declared void on the ground that the ultimate beneficiaries are not sufficiently designated therein, nor on the ground that it is uncertain whether the devisee for life will execute a will designating the ultimate beneficiaries.

5. —: TRUST ESTATE: WORDS TO CREATE. No particular form of words is necessary to create a trust estate by will. It is sufficient if the intent is clear.

Appeal from Wapello District Court.

TUESDAY, DECEMBER 4.

ACTION in chancery to construe a will, and to set aside certain bequests therein made. A demurrer to the petition was sustained, and, plaintiffs refusing to amend, the petition was dismissed. Plaintiffs appeal. The facts of the case are fully stated in the opinion.

Stiles & Beaman, for appellants.

H. B. Hendershott and *McNett & Tisdale*, for appellees.

BECK, J.—I. Mary Tally, deceased, executed a will, in the sixth item of which she directs that a certain note and mortgage securing it, made to her by The Sisters of the Humility of Mary, a corporation organized under the laws of the state, should be surrendered to that corporation, and should be canceled without payment. The seventh item of the will disposes of certain notes and mortgages by directing, in the language of the will, that the securities "shall go and be held and controlled and managed by my friend and relative, Miss Mary T. Shields, for and during her natural life, and for her and to her sole benefit, and, at the death of Mary T. Shields, I desire, and my will is, that the principal of the securities in this subdivision of my will mentioned, and so much of the interest arising therefrom as shall remain in the hands of Mary T. Shields unexpended, shall go to the sup-

port and encouragement of such worthy and charitable and educational and religious institutions of the Roman Catholic faith, as my said friend, Mary T. Shields, may determine, and she is charged with the duty of making such disposition of said means as is herein provided, by will properly executed before her death, it being my intention that so much of the funds herein entrusted to said Mary T. Shields, for her use and benefit during her natural life, as may remain at her death, shall not descend to her heirs, but go, as above provided, to some Catholic institution or institutions."

The ninth item directs that Mary T. Shields "shall take and hold, for the purposes mentioned in the seventh subdivision [item] of this will," certain real estate, "or the proceeds which may arise from the sale of said property."

The plaintiffs are the heirs at law of Mary Tally. They allege in their petition that The Sisters of the Humility of Mary, which is claimed to be a corporation organized under chapter 2, title 9, of the Code, which provides for the organization of corporations other than those for pecuniary profit, is not, by its articles of incorporation, intended or required to act for any of the purposes specified in the chapter of the Code referred to, or for any public charity or purpose, but exercises its powers for adequate compensation, and for private gain to itself or to its individual members. It is claimed in the petition that the incorporators, as is shown by the articles of incorporation, have and are to have no associates, or accession to their numbers, and that the incorporation does not hold its property in trust, but as an absolute owner, having power to manage, control, and dispose of all property for the benefit of itself and the incorporators.

It is also claimed that the devise to the corporation is not by its terms in trust, but is an unqualified gift, without any direction or obligation imposed to use the funds for any charity.

It is also shown that the will is witnessed by Ellen Galvin, one of the incorporators, who has ever since been a

member of the incorporation, and that, as but one other witness attests it, the corporation cannot take under the will, by reason of the alleged fact that Ellen Galvin is not, as is required by the statute, a disinterested and competent witness. This claim is based upon the allegation of the petition above set out.

It is alleged in the petition that the bequest in the seventh item, and the devise in the ninth, are void for uncertainty, inasmuch as the will does not indicate the persons or objects for which the funds and property shall be appropriated.

It is shown by an amendment to the petition that the incorporators, who are the only members of the corporation of The Sisters of the Humility of Mary, are all aliens, and none of them are citizens of the United States and of this state. For this reason it is claimed that they are not authorized by the laws of this state to become an incorporated body.

The defendants, the executors named in the will (Mary T. Shields being one of them), which has been admitted to probate, and the legatee and devisee named in the sixth, seventh and ninth items of the will as above shown, demurred to the petition, on the ground that it fails to show facts entitling plaintiff to the relief claimed. The demurrer was sustained. The case is before us for determination upon the pleadings.

II. It will be observed that the petition assails the respective items of the will on different grounds. 1. The bequest to The Sisters of The Humility of Mary is claimed to be void, for the reason that Ellen Galvin, one of the two witnesses to the will, is not competent and disinterested. The claim is based upon the ground that the corporation is not a charitable institution, but is a private corporation for profit, and the witness to the will has a property and interest in its assets. 2. The incorporators and members of the corporation are not citizens of the United States and of this state. 3. The bequest and devise to Mary T. Shields is

claimed to be void for uncertainty. We will proceed to consider these grounds of objection to the will.

III. We will proceed to enquire whether Ellen Galvin, under the facts of the case as disclosed by the allegations of the petition, is a competent and disinterested witness to the will. It may be premised that the questions relating to the character and powers of the corporation of the Sisters of Humility of Mary, and whether it is a corporation for charitable purposes or for pecuniary profit, relate alone to the question of the competency of the witness to the will. If she is a competent witness, and there is, on the grounds of her interest, no objection to the will, the corporation will take the property without regard to its character and powers.

The allegations of the petition, urging the objections to the will on the ground of the interest of the witness, are all based upon or refer to the articles of incorporation of The Sisters of the Humility of Mary. It becomes necessary to consider these articles, in order to determine the question before us. This can be better and more fairly done by setting out in full the articles of incorporation, which are in the following language:

"Articles of Incorporation of The Sisters of the Humility of Mary, made and adopted this eleventh day of May, 1878, in accordance with the provisions of Chapter 2, Title IX, of the Code of Iowa, A. D. 1873:

"ART. 1. The name of this corporation shall be 'The Sisters of the Humility of Mary.'

"ART. 2. The territory of its business shall be the state of Iowa, with its principal place of doing business Ottumwa, Wapello county, state of Iowa.

"ART. 3. The incorporators are, Mary Catherine Manjean, Mary Lawler, Ellen Galvin, Ellen Wogan, Anna Patterson, Margaret Burke, Jane Mangan and Josephine Gerardine.

"ART. 4. The object and purposes of this association are to afford a greater opportunity and more security to the in-

1. WILL: devise to charitable corporation: competency of corporation as witness.

2. CORPORATION: whether for charity or for profit.

corporators and their successors, in the establishment and management of hospitals, schools, asylums, and other institutions, for the relief, education and care of the poor, the needy, the distressed, the orphan, and the ignorant.

"ART. 5. The business, funds and property of this association shall be managed, controlled, protected and preserved by a council of three, chosen from the members of the association, who shall hold their offices for three years, and until their successors are duly elected and qualified, and the council of three for the first three years shall consist of Mary Catherine Manjean, Mary Lawler and Ellen Galvin.

"ART. 6. The persons named in Article 5 shall, within three days after the incorporation of this body—or as soon thereafter as they conveniently can—and the members of each succeeding council shall, within a like time after their election, proceed to elect by ballot from their number, for the ensuing three years, a Superior, and to appoint such other officers and agents as they may deem expedient and necessary, and who shall hold their offices and agencies for the term of three years, and until their respective successors are duly appointed and qualified, or, if they are appointed for a less time than three years, then for the time they may be appointed, unless sooner discharged.

"ART. 7. The council of three shall have power to adopt by-laws and regulations as they may deem proper for the control and management of the hospitals, schools, asylums, and other establishments under their care and control, and the efficient government of their own council, and the officers, and agents appointed thereby, such by-laws, rules and regulations, not being contrary to these articles, the laws and constitution of the United States and of the state of Iowa, and the said council may do and perform everything proper and necessary to be done to carry out the objects and purposes of this association, but in no case shall any officer or agent of this association be paid any sum for her services as such.

"ART. 8. The parent house in this state, and the principal place of doing business, shall be located at the city of Ottumwa, in the county of Wapello, Iowa.

"ART. 9. The association shall have full power and authority to acquire, possess, hold, use, and enjoy by gift, grant, devise, bequest, purchase or otherwise, real estate or personal property, and shall have power to sell, convey, mortgage and dispose of the same in any manner the said association shall deem best for the interest of the association and the furtherance of the objects and purposes for which their association is created.

"ART. 10. This corporation shall have a seal, on which shall be engraved the words 'The Sisters of the Humility of Mary, Ottumwa, Iowa,' and which shall evidence its official and corporate acts.

"ART. 11. This corporation shall have power to sue and be sued, to make contracts, and in general to do all the acts of a natural person, which may be necessary to carry out its objects and purposes.

"ART. 12. This corporation shall endure for twenty years, as provided by Sec. 1069 of the Code of Iowa, of 1873, and shall have the privilege of re-incorporating, as provided by Sec. 1102 of said Code, and in general shall enjoy all the powers, privileges and immunities and benefits provided for by the laws of the state of Iowa, for the purpose for which it is created."

The fourth article of the foregoing instrument declares that the purpose of the association is to enable the incorporators to establish and manage hospitals, schools, asylums, and "other institutions, for the relief, education and care of the poor, the needy, the distressed, the orphans and the ignorant." These objects are all essentially charitable, and are never pursued, when under the care of religious sects, whether Catholic or Protestant, with the view of pecuniary profit. The distribution of dividends to corporators or others arising from the earnings or profits of such institutions is an unheard of

thing. The idea of making money out of such institutions, where, as in the case before us, they are established and supported "for the relief, education and care of the poor, the needy, the distressed, the orphans and the ignorant," could never have been entertained.

There is nothing in the articles of incorporation disclosing any such a purpose. On the contrary, the instrument, considered in the light of the public history of such institutions, shows that there was no such purpose on the part of the incorporators. Article 7 declares that the officers and agents of the corporation shall receive no compensation for services rendered. It is true that pupils in the schools, or patients in the hospitals, may, as is claimed, in some instances or in most instances, pay the institution for services rendered. But it does not follow that the sums so secured, or any part of them, may or can be divided as profits. It is true that all such institutions, when established by religious sects, are endowed by funds given or bequeathed by the benevolent, and it is also true that they cannot be successfully conducted without such endowments. It clearly appears that the incorporators of the association in question can receive no dividends or profits therefrom. The witness to the will, therefore, has no pecuniary interest, based upon the right or expectation of receiving dividends or profits.

But it is urged that, upon the dissolution of the corporation, its assets will be divided among the corporators, and, for that reason, the witness has an interest in the property bequeathed by the will. For the purposes of the case, let the position be admitted, though we do not so hold, and, to say the least of the proposition, it is extremely doubtful.

But such interest is uncertain and contingent. It depends upon whether the witness will survive the dissolution of the corporation; whether it will, when dissolved, have any assets to distribute, or whether it may not by reincorporation continue to hold the funds indefinitely. The interest, to disqualify the witness to a will, must be present, certain and

vested. See *Hawkins v. Hawkins*, 54 Iowa, 443. In that case, it is held that a wife has no such interest in a legacy to her husband as will disqualify her to witness the will. Yet, surely, the interest of the corporator signing the will in this case as a witness is not less remote, uncertain and contingent than the interest of a wife in a bequest to her husband. We conclude, therefore, that Ellen Galvin is a competent and disinterested witness to the will involved in this case.

IV. It is urged that, as the incorporators and present members of the corporation of The Sisters of The Humility of Mary are not citizens of the United States and of this state, the will, so far as it requires the notes and mortgage executed to the decedent to be canceled, is void. The thought upon which the position is based is that, as the statute, Code, § 1095, requires corporators of associations to be citizens of the United States, and at least a majority of them to be citizens of the state, the corporation has no legal existence, and therefore it cannot resist plaintiffs' claim made in this action. The repetition of certain facts in this connection will aid a clear understanding of our conclusions upon this point, and the reasons upon which they are based. The Sisters of the Humility of Mary, as a corporation, executed a note and mortgage to the decedent, Mary Tally, of whom plaintiffs are heirs. The sixth item of the will in question directs that the note and mortgage be cancelled and surrendered to the Sisters without payment. Plaintiffs claim that the note and mortgage should be regarded as assets, not subject to the will, but subject to distribution to the heirs of decedent.

They do not claim that these instruments are invalid and not binding, upon the ground of the illegal organization of the corporation, or for any other reason. On the contrary, we understand that they insist that they are capable of being enforced. If they are void, it would be a vain thing for plaintiffs to contend about the direction they take, whether to the legatee or the heirs. We have, then, the case of the

2. WILL: devise to corporation: illegal corporate organization.

plaintiffs insisting that the note and mortgage are valid, but that the bequest directing their collection is void, for the reason that the corporation is not legally organized.

Code, section 1089, provides that "no body of men acting as a corporation shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation; nor shall any person sued on a contract made with such corporation, or sued for an injury to its property, or a wrong done to its interests, be permitted to set up a want of such legal organization in his defense."

This provision, it will be observed, sustains plaintiffs' position that the note and mortgage cannot be resisted by the Sisters on the ground that they are not legally incorporated.

The provision goes further, and declares that, in an action brought by a corporation upon contract, or for injury to its property, or "for a wrong done to its interest," the defendant cannot plead in defense the want of legal organization of the plaintiff corporation. The purpose of the section is to provide that the enforcement of rights against corporations, and the enforcement by a corporation of contracts made with it, and the recovery of claims for "a wrong done to its interest," cannot be defeated on the ground that the corporation was not legally organized. It cannot be claimed that these provisions apply only when the corporation, or the person contemplated in the section, is defendant in an action. But if the rights contemplated in the section are attempted to be enforced in an action, the provisions apply, whether the person claiming them is a plaintiff or a defendant. It often happens that rights to property, or rights under contracts, or "a wrong done to the interest" of a person, are enforced by defendants to actions. In such case the provision applies.

Is the subject matter of this action, so far as the Sisters' corporation is concerned, of such character as to bring the case within the rule of this section? It involves the right of the corporation to the securities bequeathed in the sixth item

of the will. The Sisters insist on the enforcement of this item; plaintiffs insist that it is void, and resist its enforcement by asking that it be declared void by a proper decree of the court.

The contest is over the right based upon that item. It is in the nature of a contract, which, "in its more extensive sense, includes every description of agreement *or obligation* whereby one party becomes bound to another to pay a sum of money, or to do or omit to do a certain act; *or a contract is an act which contains a perfect obligation.*" Bouvier's Dictionary. It is said in Chitty's Contracts, p. 1, that "the term *contract* comprises, in its full and more liberal signification, every description of agreement, *obligation, or legal tie*, whereby one party binds himself or becomes bound, expressly or impliedly, to another to pay a sum of money, or to perform or omit to do a certain act." An obligation of record, as a judgment, recognition, or the like, is included within the term contract. A bequest falls within the term, and when the will is admitted to probate it is to be regarded as a contract of record. It follows that, where a corporation seeks to enforce a bequest in a will duly admitted to probate, its claim cannot be resisted on the ground that it has not been legally organized. This is the precise case before us. In this action, the corporation ask that the will be enforced; the plaintiffs seek to set it aside on the ground of illegality in the corporation's organization. But on that ground its validity cannot be questioned, as we have seen.

This construction of the statute in question is demanded by justice and the interest of the public. Corporations defectively or illegally organized may acquire great property interests in personal and real estate and chuses in action. Their business is conducted and property managed in the same manner as though they were legally organized, and the interest and rights of all parties dealing with them are involved. If, in an action to enforce any right held by a corporation, it were declared to have no legal existence, great confusion and

lossess would result, not only to its members, but to persons having dealings with it.

This view does not ignore and disregard the statutes prescribing the manner of organizing corporations, or providing as to the character of the persons who shall be incorporators. These statutes may be enforced by proper proceedings at law by *quo warranto*, and if it be found that a corporation is not legally organized, and should be ousted of its franchises, and dissolved, trustees will be appointed who, under the direction of the court, will protect the creditors of the corporation and all persons interested in its property. See Code, § § 3345, 3360, 3367.

V. We come now to the consideration of the bequest
 4. DEVISE for life : disposition of remainder by will of devisee. and devise found in the seventh and ninth items of the will. They need not be separately referred to in our discussion of the principles of law, the same doctrines applying to both.

It plainly appears that in these items a life estate in the real property, and the income arising from the personalty during the life of Mary T. Shields, are willed to her. This is not denied by either party. The only question in dispute is this: Does the will so dispose of the estate in remainder in the realty, and the funds that shall be found upon the death of the devisee and legatee, that the court will enforce its provisions. Counsel for plaintiffs insist that these items of the will are void for uncertainty. This statement discloses the question for our decision in this branch of the case.

It is first insisted by plaintiffs' counsel that the objects and charities mentioned in the will, to which the real estate and funds are to be appropriated, are so uncertain that the law will not and cannot effectuate the intentions of the testator, and enforce the will. The foundation of this position is that the will does not, with sufficient certainty, indicate the beneficiaries of the charity.

Reading the items of the will in question, we discover the testament in the following language: "I desire, and my will

is, that the principal of the securities in this subdivision of my will mentioned, and so much of the interest arising therefrom as may remain in the hands of said Mary T. Shields, unexpended, shall go to the support and encouragement of such worthy and meritorious charitable and educational and religious institutions of the Roman Catholic faith, as my said friend, Mary T. Shields, may determine." The beneficiaries of the charity of the testator are here clearly indicated to be "such worthy and meritorious" institutions of the "Roman Catholic faith," as may be determined by Mary T. Shields. The will does not specifically name the persons or institutions that are to receive the charity. It leaves the beneficiaries to be chosen and named by the person appointed to distribute the charity. It is competent for a testator to bestow a charity upon a person or institution to be chosen or named by a trustee or executor. In that case, there is no uncertainty of the beneficiary, for the courts, when called upon to enforce the testament, will be advised of the direction of the charity by the act or declaration of the trustee or executor. Wills providing for the distribution and appropriation of charities in this manner are always upheld by the courts. Perry on Trusts, § 731; 2 Redfield on Wills, (2 Ed.,) p. 530-535; *Hesketh v. Murphy*, 35 N. J. Eq., (8 Stewart,) 23; and see cases cited in note by reporter; *Wells v. Doane*, 3 Gray, 201; *Brown v. Kelsey*, 2 Cush., 243; *Saltonstall v. Sanders*, 11 Allen, 446; *First Universalist Society of North Adams v. Fitch*, 8 Gray, 421; *Going v. Emery*, 16 Pick, 107; *Miller v. Teachout*, 24 Ohio St., 525; *Am. Tract Soc. v. Atwater*, 30 Ohio St., 77; *De Bruler v. Ferguson*, 54 Ind., 549; *Com. of Lagrange Co. v. Rogers*, 55 Ind., 297; *Pickering v. Shotwell*, 10 Pa. St., 23; *Witman v. Lew*, 17 S. & R., 88; *Beaver v. Filson*, 8 Pa. St., 327; *Perin v. Carey*, 24 Howard, 465; *Loring v. Marsh*, 6 Wall., 337.

An elaborate note to *Hesketh v. Murphy*, *supra*, by the reporter and another, found in the Am. Law Register, Vol.

21 (N. S.), p. 660-666, (October, 1882,) cites scores of cases holding that similar dispositions of charities by will are valid. It also gives quite a number that may be cited against the doctrine. We doubt not, however, that the conclusion we reach is supported by the great weight of authority. The facts of this case distinguish it from *LePage v. McNamara*, 5 Iowa, 124.

We reach the conclusion that the will is not void for uncertainty of the beneficiaries of the charity.

VI. We are to inquire whether there is a *trustee* named in the will, whose act or designation will render certain the beneficiaries of the charity. This may be admitted, for the purposes of the case, without so deciding, to be necessary. Counsel for plaintiffs insist that the will provides for no such trustee. We think the contrary clearly appears, and that the instrument in the plainest terms names Mary T. Shields as such trustee. The language of the will following that last quoted is as follows: "She [Mary T. Shields] is charged with the duty of making such disposition of said means as is herein provided, by will properly executed before her death, it being my intention that so much of the funds herein entrusted to said Mary T. Shields for her use and benefit during her natural life, as may remain at her death, shall not descend to her heirs, but go, as above provided, to some Catholic institution or institutions."

It cannot be doubted that, if the words "by will properly executed before her death" had been omitted, the language would have clearly indicated the creation of a trust, and directed its execution. But counsel for plaintiff urge that, as these words limit the power of Mary T. Shields to make the appropriation of the charity and designation of the beneficiaries by will, she cannot, therefore, be regarded as a trustee. There is no force in this position for these reasons: Suppose Mary T. Shields should waive her life estate and interest in the property, can it be doubted that she could then

indicate the beneficiaries to receive the charity? Or can it be doubted that she has the right and power to surrender her life estate? In case she should do so, the trust could be executed by her in her life-time. Can it be said that she will not do so? Surely chancery will entertain no such presumption.

But we are able to discover no reason why the trust may not be executed by a will, as permitted or contemplated by the language of the testament before us. Indeed, the provision seems to have been suggested by common sense, seeking to effectuate the intention of the decedent. She intended that Mary T. Shields should enjoy the property during her life, and she further intended that the same power should direct the charity to the beneficiaries who should finally receive it. When Shields' rights shall cease, she will be no more in life, and will, therefore, be incapable of then naming the beneficiaries. But property may be disposed of by will, and the decedent, in the exercise of good common sense, chose that character of disposition on the part of Shields which would perfectly carry out the intention of the testator. We know of no legal principles which will defeat the will on this ground, and have been referred to no authorities so holding. The authorities hold, we think, that a power relating to a trust may be executed by a will, where the power creating the trust so provides. See 4 Kent's Com., *330; 2 Hilliard's Real Prop., p. 563, § 41; 2 Greenleaf's Cruise on Real Prop., p. 534, § 16; 1 Jar. on Wills, p. 547; 1 Story's Eq. Jur., § 173, and notes. These authorities go to the extent of holding that, when no form for the execution of the power is prescribed, it may be executed either by deed or will.

VII. It is urged that Shields may not execute a will, and in that case the court cannot enforce the will, for the reason
 THE SAME. of the uncertainty that will exist as to the beneficiaries of the charity. We cannot presume that the trustee will neglect to discharge the duty imposed upon her of naming by will the beneficiaries, but, on the contrary,

Avery, Spangler & Co. v. Chapman.

must presume that she will, in the discharge of her duty, indicate by testament the objects to which the charity shall be appropriated. But, at all events, that question cannot now be anticipated. It will be time enough to meet it when Shields dies without making the disposition of the property by will, if such a thing should happen.

VIII. It is insisted that Shields, by the will, takes no title to the real estate mentioned in the ninth item. This position is based upon the thought that she is not made a trustee by the will. But, as we have shown, she is regarded as a trustee. The objection, therefore, falls. In order to create a trust estate by will, the law requires no particular form of words to be used by the deviser. If his intention is sufficiently disclosed, that the property shall be held and disposed of by the trustee named, a trust estate vests in the trustee under the will.

The foregoing discussion disposes of all questions necessary to be considered in the disposition of this case, and brings us to the conclusion that the judgment of the district court ought to be

AFFIRMED.

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AVERY, SPANGLER & Co. v. CHAPMAN.

1. **False Representations as to another's Responsibility: LIABILITY OF MAKER.** In an action for damages alleged to have been sustained by reason of the defendant's having falsely represented the financial condition of another, a recovery cannot be had unless it is shown, not only that the representations were false, but that the defendant knew them to be false at the time they were made. It is not sufficient to show merely that defendant did not know them to be true.
2. **Instruction: ERROR WITHOUT PREJUDICE.** The fact that an erroneous instruction was given on the trial is no ground for reversal, where it appears from the whole case that appellant could not have been prejudiced thereby.

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3. **Practice: INTERPRETATION OF LETTERS IN EVIDENCE.** Where letters which had passed between the parties were in evidence, and were in plain language, requiring no interpretation, and the jury had all the collateral facts, the determination of their meaning and import was properly left to the jury.

Appeal from Guthrie District Court.

WEDNESDAY, DECEMBER 5.

THIS is an action at law by which the plaintiffs seek to recover damages of the defendant for fraudulently representing to the plaintiffs the financial condition of one Hutley, whereby plaintiffs were induced to extend credit to Hutley to their injury. There was a trial by jury, which resulted in a verdict for the defendant. A motion for a new trial was overruled, and judgment was rendered upon the verdict. Plaintiffs appeal.

Sims & Caswell, for appellants.

C. S. Fogg, for appellee.

ROTHROCK, J.—I. The plaintiffs are grain merchants at Walnut, Iowa. The defendant is a banker at Stuart.

On the twenty-first day of August, 1878, one of the plaintiffs addressed a letter to the defendant, of which the following is a copy: "Jonathan Hutley bought several cars of corn from us, which we will ship to-day. How is he; all right? Please answer by return.

"Yours respectfully,

"J. C. SPANGLER."

The letter was answered on the same day as follows: "In my opinion Jonathan Hutley is all right, and will pay for all grain he buys as soon as it is on track. He has a good account with me.

"Yours truly,

"E. G. CHAPMAN."

On the day these letters were written, a person whom the plaintiffs supposed to be Hutley appeared at Walnut, and the plaintiffs sold him two carloads of corn. They held the corn until they received the above letter from the defendant. When the letter was received, the corn was shipped, and it was paid for, as we understand the evidence, by a draft drawn by defendant. It appears that at that time there was deposited with defendant some \$450 or \$500 to the credit of Hutley. It turned out afterwards that the person who appeared at Walnut and made the contract with the plaintiffs was not Hutley, but that he claimed to be Hutley's agent. At the time of the purchase of these carloads of corn, the person claiming to be Hutley's agent made arrangements for the purchase of other grain of plaintiffs, to be delivered in the future; and between that time and the twenty-eighth of August the plaintiffs shipped to Hutley several carloads of corn and wheat. Hutley, or some one representing him, sent to them in payment for the shipment certain drafts on Culver & Co., commission merchants of Chicago. These drafts were protested for non-payment, and the plaintiffs thereby lost some \$1,300.

It is charged in the petition, in substance, that the plaintiffs were induced by the letter of the defendant to ship the grain to Hutley, to the amount in value of \$1,500; that the defendant well knew, at the time of writing the said letter, that Hutley was not able to pay for said grain, and was not fit to be trusted therewith on credit, and that the said Hutley was, at the time of making said purchases, and still is, wholly worthless and irresponsible pecuniarily, "and was at the time of the writing of the letter, as aforesaid, by said Chapman, and known to him to be so worthless and irresponsible; that, by reason of said false and fraudulent representations of the defendant, the plaintiffs have been damaged in the sum of fourteen hundred dollars."

It will be seen that the defendant was by the petition charged with liability because of false and fraudulent representations as to the financial character and responsibility of

Hutley. The court gave the jury the following, among other instructions:

"9. Before the plaintiffs can recover a verdict for anything in this case, you must find from a fair preponderance of the evidence that they have proved substantially the most material allegations of their petition, to-wit: that the defendant wrote and sent to J. C. Spangler the letter introduced in evidence as having been written and sent by the defendant to said Spangler; that the defendant wrote and sent said letter with the intent and design to induce the plaintiffs to sell grain on credit to the said Hutley; that the representations made by said letter were false and fraudulent within the knowledge of the defendant, and that they were made intentionally to deceive, and induce the sale of the grain mentioned to said Hutley on credit. In other words, to maintain an action for damages for a false representation and fraud, three circumstances must combine: first, it must appear from the evidence that the representations were contrary to the fact; second, that the party making them knew them to be contrary to the fact at the time they were made; and third, that it was the false representations which gave rise to the contracting of the other party. And, of course, before you can find for plaintiffs, you must find, in addition to what is above stated, that the plaintiffs did by reason of the said representations in said letter sell the grain mentioned in plaintiffs' petition, or some part of the grain mentioned therein, to said Hutley on credit; that they have not been paid therefor; that said Hutley has not sufficient means or property in this part of the country subject to execution to make the amount due from him to the plaintiffs for said grain. If you do so find, you must find for the plaintiffs. But if you fail so to find, you must find for the defendant."

Counsel for appellant insists that this instruction is erroneous. He claims that it was not necessary to prove that the defendant knew that the representations were false when they were made, but that if the representations were false, and if

made recklessly and not knowing them to be true, and having no reason to believe them to be true, the defendant is liable. And appellants asked certain instructions to the jury to this effect.

We think the court did not err in giving the instruction above set out, and refusing the instructions asked; and we need not enter into a discussion of this question. The measure of proof required by the instruction given has been the law of the state since the decision in *Holmes v. Clark*, 10 Iowa, 423. That case has been repeatedly followed without deviation by this court. The case of *McKown v. Furgason*, 47 Iowa, 636, cited by counsel for appellants, does not contain any doctrine inconsistent with the previous cases involving this question. In that case it was held that an instruction "that the representations made by the defendant were false, and that they were known to be false by the defendant at the time they were made," should have been given to the jury.

Another very cogent reason why the instruction should have been given in this case is, that the defendant did not make the representations as importing knowledge, but as an opinion, which was but his judgment of the financial standing of Hutley.

II. This instruction is also objected to because it required the jury to find that Hutley had not sufficient property in that part of the country subject to execution to make the amount due from him to the plaintiffs for the grain.

The objection is founded upon the fact that the court used the present tense in writing the instruction, so that it literally instructed the jury that it must be shown that Hutley was insolvent at the time of the trial. This statement in the instruction, if it be conceded to be erroneous, was not prejudicial to the plaintiffs. The insolvency of Hutley was not disputed upon the trial. Indeed, it is not at all certain that there is or ever was any such person in existence. No witness testified that he ever saw him. The whole record shows

that some one appeared in Stuart and Walnut, who claimed to be an agent of Hutley, to buy grain. He defrauded the plaintiffs of some \$1,300, and even if the jury were instructed erroneously that the plaintiffs must show that Hutley was insolvent at the time of the trial, it was without prejudice, because, under the facts, no other finding could have been made.

III. The court refused to put a construction upon the letters which passed between the parties, and instructed the jury that they were to take them and consider them the same as if the parties had met and spoken to each other in the same language as that contained in the letters. There was no error in this. The letters were in plain language; they required no interpretation; and the jury were put in possession of all the facts necessary to determine their full meaning and import.

IV. It is objected that the instructions of the court on testimony offered by the plaintiffs to prove the general custom among bankers and grain dealers in western Iowa, and other rulings upon the admission of evidence, were erroneous. We think otherwise. We fail to discover anything in the record authorizing proof of any general custom, and all the rulings of the court pending the introduction of the evidence appear to us to be correct.

AFFIRMED.

STATE V. MIDDLEHAM.

1. **Criminal Evidence: MURDER: EXCLAMATIONS OF DEFENDANT'S WIFE.** The exclamations of a wife upon the killing of her son by her husband, made in the presence and hearing of the husband, are admissible as against him. The exclamation in this case was not a "communication" by the wife to the husband.
2. ———: ———: **ERROR WITHOUT PREJUDICE.** Where certain evidence had no other tendency than to establish the grade of the offense, but the jury found the defendant guilty of the lower grade, the defendant was not prejudiced thereby, and, if there was error in its admission, it was not reversible error.
3. ———: **STATE NOT BOUND TO CALL ALL ITS WITNESSES.** While the state should be held to prove the whole transaction constituting a crime before the prisoner is put to his defense, this does not make it incumbent upon the state to call all the witnesses who were present at the transaction, where the whole transaction can be shown by a part of them.
4. ———: **SELF-DEFENSE: DANGEROUS CHARACTER OF DECEASED.** As bearing upon the question of self-defense in a prosecution for murder, the defendant might be permitted to show that he knew the deceased to be quarrelsome and dangerous; but in such case a question to a witness requiring him to state whether the manner of the deceased was "reckless" or "quiet" was properly ruled out.
5. **Murder: SELF-DEFENSE: OBLIGATION TO RETREAT.** A man who is assaulted in his own house need not retreat in order to avoid slaying his assailant in self-defense; but he must not even there take life, unless to all reasonable appearances it is necessary, to protect himself and his home.

Appeal from Jasper District Court.

WEDNESDAY, DECEMBER 5.

THE defendant was indicted and tried for murder in the first degree, and convicted of manslaughter. He appeals.

Martin, Murphy & Lynch, Bolton & McCoy and H. S. Winslow, for appellant.

Smith McPherson, Attorney-general, for the State.

DAY, CH. J.—I. The evidence shows that the defendant

killed his step-son, William Davis, with a knife, in the Central House, a hotel kept by the defendant. One Penlan was introduced as a witness, and testified as follows:

1. CRIMINAL evidence: murder: exclamations of defendant's wife. "John Carr arrested defendant that day in the Central House, in what was called the bar-room. I went in right after him." He was then asked the following question: "State what, if anything, was said by Mrs. Middleham there, in the presence and hearing of the defendant, concerning the manner in which the homicide was committed and the connection of the defendant with the homicide?" This question was objected to as incompetent, immaterial and hearsay, and as calling for the declarations of a party not a competent witness against the defendant. The objection was overruled, and the witness answered: "Soon after I went into the house, Mrs. Middleham threw up her hands and says, 'My God! My God! he has killed my boy! He struck him right over my shoulder. See the blood of my boy on my sleeve. Take him away; I never want to see him.'" The admitting of this evidence is assigned as error. It is insisted that it is incumbent to establish, not only presence and hearing, but also understanding. In support of this objection appellant cites *Lanergan v. People*, 39 N. Y., 39. The case is not in point, as it was shown in that case that the defendant was asleep, "sound and solid," when the declaration which was admitted was made. The witness in this case was asked what was said in the "presence and hearing" of defendant. It was for the jury to determine from all the circumstances whether he heard and understood what was said. It is further objected that the declaration was a communication by the wife to the husband, and so not admissible. Appellant cites and relies upon *Campbell v. Chace*, 12 R. I., 333. That case simply holds that communications between husband and wife cannot be disclosed, although made in the presence of others. The declaration admitted in this case was not such a communication. There was no error in its admission.

II. One Dr. McAllister was introduced as a witness, and described the wound upon deceased as follows: "There was one cut in the neck. * * * * The knife had passed in 2. — : ———: and struck the jaw bone a little below the angle, ^{error without} _{prejudice.} and cut the artery off there, and passed into the throat, I think fully four inches and one-half. In my opinion that was a death wound. The knife described a half circle, and in an oblique direction from above downwards and forwards, extending an inch and one-half, or about that; then the knife was apparently drawn out. It cut on the external surface nearly an inch and one-half in extent. Internally it was more extensive, laying the wind pipe open an inch and one-half, so that when he breathed he made that noise that animals will when stuck by a butcher." A knife was produced in court, which was conceded to be the knife with which the wound causing the death of deceased was inflicted. The witness was then asked the following question: "Will you give your opinion as to the manner in which the knife was handled to inflict such a wound as you found in the neck of the deceased, provided it was inflicted with that knife?" This question was objected to as incompetent, not the subject of medical expert testimony, hearsay, and calling for the opinion of the witness. The objection was overruled, and the witness answered: "As near as I can tell, it was about as a butcher would stick an animal he proposed to kill." This ruling of the court is assigned as error. The appellant relies upon *Cook v. The State*, 4 Zab., 843; *People v. Bodine*, 1 Denio, 281; and *Kennedy v. The People*, 39 N. Y., 245. Even if this evidence was not strictly admissible as expert testimony, we are unable to see in what manner the defendant could have been prejudiced by it. The evidence shows, without any conflict whatever, that the defendant killed the deceased with a knife. The evidence in question would tend simply to establish the grade of the offense as murder, either in the first or second degree, by showing that the act was done with malice and deliberation. But as the jury found

State v. Middleham.

the defendant guilty of manslaughter only, he could not have been prejudicially affected by this testimony.

III. The state having rested, the defendant moved the court to require the district attorney to present the evidence of certain witnesses examined before the grand jury. The court overruled the motion as to the witnesses, ^{3. — : state not bound to call all its witnesses.} Drake and Charles Davis, and sustained it as to the witness Christy Mather. It is conceded that Drake was not before the grand jury, but it is claimed that Davis was. We cannot determine that he was from the record. Appellant insists that the rule is that the prosecutor *must* call all witnesses present at the transaction, before the prisoner is put to his defense. Appellant relies upon *Maher v. The People*, 10 Mich., 212; and *Hurd v. The People*, 25 Ill., 405. *Hurd v. The People* is a mis-citation, and we have not been able to find it.* The case of *Maher v. The People* does not sustain the position. In that case it was simply said that, when it appears that a fact has been designedly omitted by the prosecution from the series constituting the *res gestae*, or entire transaction, it would be the duty of the court to require the prosecutor to show the transaction as a whole. This statement of the law does not require the production of all the witnesses present, but simply that proof of the whole transaction shall be introduced; and even this statement is *dictum*, as the evidence under consideration was offered by the defendant, and was rejected. If an offense should be committed in the presence of one hundred persons, it surely would not be incumbent upon the prosecution to call all of them before the defendant can be put upon his defense. We discover no error in this ruling.

IV. The defendant introduced one Charles Feree, who testified that he had known deceased all his life time. The witness was then asked the following question: "You may state to the jury what was his manner—whether it was or was not reckless, or whether he was quiet." Upon the objection of the state, this ques-

4. — : self-defense; dangerous character of deceased.

* I am informed by appellant's counsel that the proper citation of this case is *Hurd v. The People*, 25 Mich., 405.—REPORTER.

tion was excluded, and the ruling is complained of. It may be that, as bearing upon the question of self-defense, the defendant would have a right to show that he knew the deceased to be quarrelsome and dangerous. See *State v. Keene*, 50 Mo., 357; *State v. Floyd*, 6 Jones, (Law,) 392; *Wise v. The State*, 2 Kan., 419; *The People v. Edwards*, 41 Cal., 640; *The State v. Nett*, 50 Wis., 524; *The State v. Pearce*, 15 Nev., 188; *Brownell v. The People*, 38 Mich., 732; *The State v. Collins*, 32 Iowa, 36. Proof, however, that the manner of deceased was reckless, goes beyond what has been held in any case to which our attention has been directed. We do not think there was any error in excluding this evidence.

V. The defendant complains of the following instructions: "The right to defend one's self against assault, and repelling force by force, is the first law of our nature, and this natural law is recognized in the laws of this state. A party who is assaulted with violence has a right to prevent harm to himself by overcoming or disabling his assailant, but, before a party assaulted has a right to resort to a deadly weapon, such as a knife, and use it in a manner dangerous to life, he must try to save himself by flight or retreating, if he may safely and reasonably do so." The evidence shows that, on the day of the homicide, the defendant and his step-son, Charles Davis, had some trouble. The evidence also tends to show that Mrs. Middleham sent for the deceased, who was not a member of the defendant's family, and that the deceased came into the dining room of the defendant's hotel, where he was at dinner, and made motions with his fist, when the defendant picked up a chair and the deceased picked up a chair, and they fought for a time, when they threw up the chairs and passed into the bar-room where the homicide was committed. No witness has been introduced who saw the closing of the affray in the bar-room. This instruction, as applied to the facts of this case, in so far as it makes it incumbent upon the defendant to retreat, is, we think, erroneous. The defendant at the time of the difficulty was in

5. MURDER:
self-defense:
obligation to
retreat.

his own house. In *Horrigan and Thompson's Cases on Self Defense*, page 33, it is said: "A man, being in his habitation, is at the wall and in his castle, and is not obliged to retreat under any circumstances. But even there he may not needlessly take life in his defense." In *Pond v. The People*, 8 Mich., 150, (177,) it is said: "A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life. But here, as in the other cases, he must not take life, if he can otherwise arrest or repel the assailant." To the same effect, see *People v. Lilly*, 38 Mich., 270, and cases cited; *DeForest v. The State*, 21 Ind., 23. Under the circumstances disclosed, the defendant was not under obligation to retreat. He, however, was not justified in killing deceased, unless such killing was to all reasonable appearances necessary to preserve his own life, or prevent great bodily harm. See *State v. Kennedy*, 20 Iowa, 569; *State v. Thompson*, 9 Id., 188; *State v. Benham*, 23 Id., 154; *State v. Collins*, 32 Id., 36. The instruction was erroneous, and we cannot say that it was not prejudicial.

REVERSED.

REINHART V. JOHNSON ET AL.

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1. **Evidence: ATTORNEY AND CLIENT: CONFIDENTIAL COMMUNICATIONS.**

An attorney may testify against a client in regard to a matter with which he was in no way professionally connected, and as to which he did not obtain his knowledge through his professional relations with his client.

2. **Sureties: CONTRIBUTION: INDEMNITY TO ONE INURES TO BENEFIT OF ALL.**

Where one of several sureties receives a fund by way of indemnity, it inures to the benefit of all; and, it appearing from the evidence herein that plaintiff has been indemnified to the full extent of payments made by him, he is not entitled to recover contribution from his co-sureties.

Appeal from Jasper Circuit Court.

WEDNESDAY, DECEMBER 5.

ON the sixteenth day of September, 1875, Loretta Long, since intermarried with one Shropshire, widow of Jesse Long, deceased, was duly appointed administratrix of the estate of her deceased husband, and executed a bond as administratrix, with the plaintiff and defendant as sureties, in the sum of \$175,000. In the settlement of the estate, the said Loretta Shropshire, as administratrix, became indebted to Alice Long Hewitt in a large amount, for which she as principal, with the plaintiff and the above named defendants as sureties, executed to Alice L. Hewitt their promissory note, upon which, in November, 1880, judgment was recovered for the sum of \$2,466.74 and costs. Execution issued upon this judgment, and the property of the plaintiff was levied upon, and, on the ninth day of July, 1881, sold, satisfying the judgment, which then amounted to \$2,662.76.

The plaintiff brings this action against defendants, his co-sureties, to enforce contribution. The plaintiff is a brother of Loretta Shropshire. The defendants claim that the plaintiff, enjoying the confidence of the said Loretta, and having full knowledge of her financial condition, and that she was about to become wholly insolvent, at a public sale of personal property of said Loretta, in October, 1877, purchased cattle and other stock to the amount and value of \$1,500, for the purpose of obtaining indemnity as one of the sureties on said administratrix's bond, for which he has not paid, and the amount of which he still holds as indemnity.

The defendants further claim that, by way of further indemnity upon said administratrix's bond, the plaintiff drew a check upon the bank of Newton for \$1,000 against money of the said administratrix in said bank, and received thereon the sum of \$1,000, which he held and used to indemnify himself as a surety upon said administratrix's bond. The de-

Reinhart v. Johnson et al.

defendants further claim that the plaintiff, as surety of said Loretta Shropshire upon a stay bond, caused certain of her real estate to be sold upon execution, and bid in by his brother, Jehu Rheinhardt; that afterward, the said Loretta being desirous of procuring a loan upon said land in the sum of \$4,250, the plaintiff exacted and received out of said loan the sum of \$750, for a reconveyance of said land to said Loretta, and that said sum was exacted and obtained as further indemnity against his liability upon said administratrix's bond. The defendants insist that all these sums inure to their benefit, and ask that the cause be transferred to the equity docket for a proper accounting.

The cause was transferred to the equity docket, and heard as an equitable action upon depositions. The court rendered judgment against each of the defendants for \$333.42, and one-eighth of the costs. The defendants appeal.

W. Phillips and Ryan Bros., for appellants.

H. S. Winslow and C. E. Roach, for appellee.

DAY, CH. J.—I. The plaintiff objected to all the testimony of David and Robert Ryan, on the ground that they

1. EVIDENCE: were incompetent to testify to any matters respecting which information was obtained from attorney and client: confidential communications. plaintiff as his attorney and confidential adviser.

These witnesses both testify that they were not the attorneys of plaintiff with reference to any of the matters about which they testified, and that no information respecting such matters was obtained by them through the confidential relation of attorney and client. From a careful examination of all the evidence, we are satisfied that the testimony of these witnesses is competent.

II. The appellee concedes the general doctrine contended for by appellant, that if one of several sureties receives

2. SURETIES: a fund by way of indemnity, it enures to the contribution: indemnity to one inures to benefit of all. benefit of all. The evidence shows that at a sale, in October, 1877, the plaintiff purchased

cattle of Mrs. Shropshire to the amount of \$1,400, and that he did not at the time of purchase pay or execute a note for them. The evidence further shows that in March, 1877, the plaintiff drew upon the bank of Newton a check for \$1,000, which was paid out of funds belonging to Mrs. Shropshire. It further appears from the evidence that on the nineteenth day of February, 1878, about five hundred acres of land, owned by Mrs. Shropshire, was sold at sheriff's sale upon a judgment on which the plaintiff was surety for a stay, and bid in by Jehu Reinhart on behalf of plaintiff, under a verbal agreement that if, in a short time, she could obtain money to pay the bid at the sale, and some other judgments on which Alexander was stay surety, Jehu would deed the land to her, or to any person she might designate. On the twenty-seventh of April, Mrs. Shropshire obtained a loan on said lands of \$4,250, and, as a condition of the reconveyance to her of the lands bid in by Jehu, Alexander exacted and obtained out of the loan \$750. There is some conflict in the evidence as to the consideration upon which these several sums were received. The plaintiff insists that the cattle were purchased and held to indemnify him upon his liability on stay bonds for Mrs. Shropshire; that the check was drawn in payment of money of his wife's which he had let Mrs. Shropshire have; and that the consideration of the \$750 was his release of a contract of lease of the premises. From a careful reading and re-reading of the evidence, we think the preponderance of the evidence shows that all of these amounts, when exacted and received, were obtained for the purpose of indemnifying the plaintiff against a liability which he anticipated would fall upon him on account of Mrs. Shropshire's bond as administratrix, as he knew she was in failing circumstances, and approaching insolvency. All of these sums were in plaintiff's hands at the date of the rendition of the judgment, and they amount to more than enough to satisfy it. The plaintiff, being indemnified to the full extent of the judgment, is not entitled to contribution from the defendants.

REVERSED.

WARE V. SMITH ET AL.

1. Promissory Notes: DELIVERY TO PAYEE WITHOUT AUTHORITY.

Where defendant executed notes and a mortgage for the purchase price of land bought of plaintiff through his agent, but, immediately upon the exchange of the securities for the deed, defendant objected to the deed, because it was not a deed of general warranty, whereupon it was agreed that plaintiff's agent should hold the notes and mortgage, and that he should procure a regular warranty deed for the defendant, but he failed to procure such deed, and delivered the securities to plaintiff, *held* that plaintiff had no right to the securities, and that his action to foreclose the mortgage was properly dismissed.

Appeal from Franklin Circuit Court.

WEDNESDAY, DECEMBER 5.

ACTION to foreclose a mortgage given to secure certain promissory notes. The defendants pleaded, in substance, that the transaction out of which the notes and mortgage grew was never consummated, and that the notes and mortgage never took effect. There was a decree for defendants. The plaintiff appeals.

McKenzie & Hemingway, for appellant.

D. W. Dow, for appellee.

ADAMS, J.—The defendant, E. A. Smith, entered into a negotiation with the plaintiff, through his agent, one Ellsworth, for the purchase for E. A. Smith's wife, the defendant L. B. Smith, of eighty acres of land. The price was agreed upon and certain papers drawn, including the notes and mortgage in question. A deed was made by the plaintiff, running to the defendant, L. B. Smith. The notes and mortgage passed into Ellsworth's hands, and the deed passed into the hands of E. A. Smith, who was acting for his wife; but, immediately upon inspecting the deed, he objected to the same. The deed contained covenants merely of special warranty; that is, covenants merely against the grantor's own acts; and

Smith claimed that he was entitled to a deed with full covenants. Such deed was never given. So far there is no controversy. As to how the transaction between Smith and Ellsworth was finally left, there is some conflict in the evidence. Smith testified, in substance, that he did not accept the deed offered; that it was agreed that it should not be recorded, and that the transaction should be left open and unconsummated, and that Ellsworth should procure a deed with full covenants, and that the notes and mortgage should not be delivered to Ware until such deed was procured. Ellsworth in his testimony rebuts Smith to some extent. He did not keep the notes and mortgage, but sent them to Ware, and testifies in substance that he did not understand that he was to retain them, but understood that the transaction was closed.

We are satisfied, however, that the preponderance of the evidence is in favor of the defendants. Ellsworth in his testimony says: "I was to start next day from home for three months, and every thing was closed up hurriedly." Under such circumstances, we can easily conceive that his memory might not be as reliable as it would be under other circumstances. He says, indeed: "We had a good deal of talk on that day about it, the details of which I can't recollect." What is more, his testimony in some respects corroborates Smith. He remembers that it was ascertained at the time that Ware's title was only a tax title; that Ware's deed was not satisfactory; that it was submitted to an attorney, who declared that it was simply a quit claim; that Smith expected to get a good title, as he claimed that he was paying more than the land was worth; that there was a good deal of talk about a warranty deed, and the responsibility of Ware; that he told Smith that Ware was a large land holder in Iowa, and he would consider his warranty deed good. We think that the transaction was not consummated, and that the papers drawn passed wrongfully into Ware's hands, and did not take effect.

AFFIRMED.

SILCOTT v. McCARTY.

1. **Practice in Supreme Court:** ABSTRACT NOT DENIED. The statements of an abstract which is not denied will be taken as true.
2. **Tax Records:** PRESUMPTION OF REGULARITY IN. Where a personal property tax appears on the tax-list of a certain township, it will be presumed, in the absence of any showing to the contrary, to have been placed there at the proper time, and by lawful authority.

Appeal from Warren Circuit Court.

WEDNESDAY, DECEMBER 5.

ACTION to recover upon the warranty of a deed for land. The cause was tried to a jury, and a verdict rendered for plaintiff under direction of the court, and judgment accordingly. Defendant appeals. The facts of the case appear in the opinion.

Todhunter & Hartman, for appellant.

H. McNeil, for appellee.

BECK, J.—I. The plaintiff seeks to recover, upon the warranty of a deed executed to him by defendant, the amount paid by him to redeem the land from a tax sale.

The point in controversy between the parties involves the validity of the sale of the lands for personal taxes levied upon the property of a copartnership, the land being assessed to one of the partners, and the tax against the partnership property being transferred to the partner to whom the land was assessed, and who, as the pleadings show, owned it. We gather from the very obscure abstracts, and the equally obscure statement of facts made by the respective parties, that the lands were *probably* sold at the same sale, as well for taxes levied upon it, as for the personal property tax of the co-partnership, and that *probably* the defendant, after ac-

quiring a title to the land by sheriff's sale, paid the amount due upon the sale arising from the tax on this land itself, or, in other words, redeemed from the tax sale, so far as to pay the personal tax, with interest, penalty and costs, assessed against the land. But these doubtful matters do not control the decision of the case, and we give ourselves no concern about them.

II. Defendant contends, as we understand him, that this personal tax was not upon the tax book against the land at the time of the sale, claiming that it appeared in the tax book to be among the taxes of a township other than the one in which the land was assessed. In other words, the personal property tax was found in the tax list for Washington township, while the real estate tax was in the list for White Oak township. The amended abstract filed by plaintiff, which is not denied, and therefore must be taken as true, shows that the tax book of White Oak township exhibits the sale of the land for the amount of the personal tax. It is evident that this personal property tax was upon the tax list of that township. When, by whom, or how it was placed there, does not appear. We must presume, in the absence of any showing to the contrary, that it was done at the proper time and by lawful authority. This aspect of the case dispenses with the consideration of defendant's objections to the decision of the court below, made in the rulings upon the admission of evidence, and in the instructions, which, with one exception, appear to be based upon the position that the personal tax does not appear upon the tax book of White Oak township.

III. The supervisors ordered the amount of the personal tax to be refunded to the holder of the certificate of purchase at the tax sale. This fact is made a ground of objection. It is disposed of by the consideration that, before payment was made under this order, it was rescinded.

It is our opinion that the judgment of the circuit court ought to be

AFFIRMED.

STEPHENSON ET AL. V. STEPHENSON ET AL.

1. **Will: SUBSCRIBING WITNESS: OPINION OF AS EVIDENCE.** A subscribing witness to a will should be limited to the statement of facts, and should not be allowed to state that the purpose of the writing, and of allowing the testator to sign it, was to quiet him.
2. ———: **PRACTICE IN PROBATE OF: CONTESTANTS ESTOPPED.** Where the contestants of a will, in order to obtain the advantage of the opening and closing of the case to the jury, admitted that the will was properly signed and witnessed, they should not have been allowed to introduce one of the subscribing witnesses to testify, in contradiction of the statement signed by her at the end of the will, that the will was not witnessed at the request of the testator.
3. ———: **UNDUE INFLUENCE: EVIDENCE: PRIOR DECLARATIONS.** The declarations of the testator, made sometime prior to the execution of the will, to the effect that certain of the legatees named in the will were totally wanting in natural affection for him, were proper to be considered with other evidence, as bearing upon the question whether the execution of the will was procured by undue influence.
4. ———: ———: ———: **SUBSEQUENT DECLARATIONS.** The declarations of the testator made subsequent to the execution of the will, wherein he said: "I don't know anything about it; they got around me and confuddled me. It is to be done over again," held admissible, not as showing undue influence, but as showing the effect on his mind of whatever undue influence, if any, was used to induce him to execute the will.
5. ———: **INSANITY OF TESTATOR: BURDEN OF PROOF.** The burden of proof of insanity in the case of a will, equally with that of a deed or contract, is upon the party alleging it, and who claims the benefit of the fact when established.

Appeal from Appanoose Circuit Court.

WEDNESDAY, DECEMBER 5.

THE proponents presented for probate the last will and testament of Robert Stephenson, Sen., deceased. The contestants admitted that Robert Stephenson signed the paper purporting to be his will, and that the same was properly witnessed, but they resisted the probate of the will on the ground that it was procured by fraud and undue influence, and that the testator was of unsound mind, and incapable of

62	163
78	708
62	163
93	604
94	345
62	163
106	211
62	163
109	217
62	163
115	322
115	322
115	436
115	436
62	163
117	744
62	163
134	37
62	163
136	120

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making a valid will. The issue was tried to a jury. The contestants claimed to have the burden of proof, which the court conceded. The jury returned a verdict that the paper purporting to be the last will and testament of Robert Stephenson, Sen., deceased, is not his valid will, and should not be admitted to probate. The proponents appeal.

Miller & Goddard and *Perry & Townsend*, for appellants.

Tannehill & Fee and *Vermillion & Vermillion*, for appellees.

DAY, CH. J.—I. The contestants produced as a witness Mrs. M. E. Williams, one of the subscribing witnesses to the will, and asked her the following questions: “What was your understanding of the purpose and object of making or writing out that will? At the time you signed the will what did you suppose was the purpose of the writing and allowing the old doctor to sign it?” These questions were objected to as immaterial, irrelevant and incompetent. The court ruled that the witness might answer the questions as explaining why she witnessed it, to which ruling the proponents excepted. The witness answered: “I thought it was to quiet him—quiet Dr. Stephenson.” This testimony, we think, was improperly admitted. A subscribing witness should testify to facts. The purpose of the execution of a will is to make a disposition of property. It is a solemn and important act. A subscribing witness ought not to be allowed to testify that it was his understanding that it was done merely to quiet or amuse the testator.

II. The witness was asked this further question: “What is your impression as to who asked you to sign the will as a witness to it?” This question was objected to for the reason that the contestants admit the execution of the will. The objection was overruled, and the witness answered: “I don’t remember distinctly who did ask me, but I think it was Mr. Goddard.” The witnesses

1. WILL: subscribing witness: opinion of an evidence.

2. —: practice in probate: contestants estopped.

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to the will subscribed to a statement that R. Stephenson, Sen., "Signed the above instrument in our presence, and declared in presence of both of us that it was his last will and testament, and he requested us both to sign it as witnesses, which we do in his sight."

The contestants, in order to obtain the advantage of the opening and closing of the case, admitted that Robert Stephenson signed the paper purporting to be his will, and that the same was properly witnessed. Having obtained the advantage of this admission, the contestants should not have been permitted to introduce testimony tending to show that the will was not witnessed at the request of the testator.

III. The contestants introduced one Mrs. L. A. Bevington, who testified as follows: "I heard him say his children didn't treat him right. That was just after he was sick, about two years before he died. He said there wasn't any of his first children, or the children by his first wife, who cared anything for him, unless it was John. He believed John did." The proponents objected to this testimony as immaterial and irrelevant. The objection was overruled, and of this action the appellant complains. One ground of objection to the probate of the will was, that it was procured by the fraud and undue influence of the devisees. The testator bequeathed nearly all of his property to Thomas and John Stephenson and Mary Ann Denoon, his children by his first wife. The fact that he formerly regarded two of these legatees as lacking in affection for him, would tend to show that in some manner his feelings had undergone a change toward them, and was competent, in connection with the other testimony, upon the question of undue influence.

IV. The contestants introduced Rachel Stephenson, wife of the testator, who testified that a day or two after the execution of the will "he asked me—What about that will? I said—I don't know anything about it. He says—Neither do I: They got around me and confuddled me. It is to be done over again." The proponents ob-

3. —: undue influence: evidence: prior declarations.

4. —: —: subsequent declarations.

jected to this testimony. The court held that the declarations of the testator may be received, not as showing undue influence, but as showing the effect on his mind of whatever undue influence, if any, was exerted upon him to procure him to execute the will. The ruling of the court is in harmony with and is sustained by *Bates v. Bates*, 27 Iowa, 110.

V. The court instructed the jury as follows: "A will admitted to have been executed and attested as prescribed by law (as the contestants admit in this case) will be presumed to have been made by a person of sound mind, in the absence of evidence to the contrary. But this presumption may be overcome by proof, and, if testimony has been shown in this case which counterbalances that presumption, then the burden of proof is on the proponents to establish by the weight or preponderance of the evidence that the testator was of sound mind when he executed the will."

The court refused to give the following instruction asked by the proponents: "The legal presumption is in favor of sanity, and, on the issue of sanity or insanity, the burden is upon him who asserts insanity to prove it. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue should be found the other way, and in favor of the execution of the will." There is a conflict of authority as to the party upon whom rests the burden of proof as to the testamentary capacity of the testator. See Abbott's Trial Evidence, p. 113; 1 Redfield on The Law of Wills, pp. 31, 51. The true rule, as well as that established by the weight of authority, is, we think, "that the burden of the proof of insanity in the case of a will, equally with that of a deed or other contract, is upon the party alleging it, and who claims the benefit of the fact, when established." 1 Redfield on Wills, p. 32, § 4. This is the rule which has been adopted by this court. In *Matter of Will of Henry Coffman*, 12 Iowa, 491. The contestants insist that the question was determined in harmony with the court's instruc-

Romick, Adm'r, v. The Chicago, Rock Island & Pacific Railway Company.

tion in *Bates v. Bates*, 27 Iowa, 110, (114). It is evident, however, from an examination of the opinion in that case, that the portion of the instruction which seems to be in harmony with that given in this case was not drawn in question, and was not directly approved. In *Webber v. Sullivan*, 58 Iowa 260, it was held that the burden of proof is on the contestants to establish undue influence. The court erred in the instruction given, and in refusing the one asked.

REVERSED.

ROMICK, ADM'R, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

32	187
92	186
62	167
94	430
62	167
100	631

1. **Railroads: INJURY TO BRAKEMAN: NEGLIGENCE IN "BACKING" TRAIN.** Where a brakeman, when about to make a coupling, was authorized by the custom in such cases to believe that the train would not be "backed" until he was ready and should so signal, it was negligence in those in charge of the train to "back" it without such signal.
2. **Contributory Negligence: DOES NOT NECESSARILY DEFEAT RECOVERY.** The contributory negligence of the person injured will not excuse the other negligent party, if the contributory negligence was known to him, and he could have avoided the injury by the exercise of reasonable care.

Appeal from Madison Circuit Court.

WEDNESDAY, DECEMBER 5.

ACTION to recover for personal injuries sustained by plaintiff's intestate while in the service of defendant as a brakeman, which resulted in his death. The cause was tried to a jury and, upon the close of plaintiff's evidence, the circuit court directed the jury to return a verdict for defendant, whereon a judgment was entered. Plaintiff appeals.

A. R. Smalley and Bryan & Bryan, for appellant.

Wright, Cummins & Wright, for appellee.

Bomick, Adm'r, v. The Chicago, Rock Island & Pacific Railway Company.

BECK, J.—I. The plaintiff's intestate was in the employment of defendant as a brakeman upon its railroad. In coupling a dining car to the "caboose" of a freight train, to be drawn from Atlantic to Council Bluffs, he received injuries that caused his death. The "caboose" had a "bumper" of ordinary construction, and the dining car was provided with a Miller's coupler. The deceased was between the cars when he made the attempt to couple them, but the "bumper," upon striking Miller's coupler, slipped aside and ran under the platform of the dining car, crushing deceased, and killing him almost instantly. It is alleged that defendant's employees were negligent upon various grounds. One only need be mentioned, namely, in signaling the person in charge of the engine to move backward in order to make the coupling, while deceased was between the cars preparing therefor, without a signal from him.

II. The evidence shows that, prior to the attempt to couple the cars, the train was backed and stopped, so that the "caboose" was within six feet of the dining car when deceased went between the cars to make the coupling, which was delayed by reason of difficulty in removing a coupling pin, and the necessity of procuring another. The evidence tended to prove that, in making a coupling of cars of the construction of those in question, the person charged with the duty usually stands between the cars, and the cars are moved only upon his signals, and that the deceased did not signal or in any manner direct the train to be backed when he received the fatal injury.

I. RAILROADS:
injury to
brakeman:
negligence in
"backing"
train.

The circuit court directed the jury to find a verdict for defendant, upon the grounds that the evidence failed to show that defendant was negligent, and did show that the deceased contributed to his injury by his own negligence. We think in this ruling there is manifest error.

III. The evidence tends to show negligence of defendant's employees in moving the train without the direction of

Romick, Adm'r, v. The Chicago, Rock Island & Pacific Railway Company.

deceased. Under the proof, it should not have been "backed" until deceased should have so directed. He was authorized to believe that the train would not be moved until he was ready, and should so signal.

But it is urged that deceased contributed to the injury by his negligence in going between the cars, being warned of the danger by a fellow employe. If this position be found to be supported by the evidence, it is answered by the consideration that the evidence tended to show that defendant's employes, who directed the train to be moved, had knowledge of the alleged negligence of deceased in going between the cars. Under a familiar rule recognized by the court, contributory negligence of the person injured will not excuse the other negligent party, if the contributory negligence be known to him, and he could have avoided it by the exercise of reasonable care. There being evidence upon the questions of the negligence of the parties, and the knowledge of the co-employes of the deceased of his negligence, if he was guilty of any, these questions, under repeated rulings of this court, should have been submitted to the jury.

On account of the error in withdrawing the case from the jury, the judgment of the circuit court will be reversed, and the case will be remanded for a new trial.

2

- REVERSED.

COOK v. BENSON.

1. **Nuisances: BARN AND PRIVY: ESTABLISHED FRONTAGE OF CITY LOTS TO BE RESPECTED.** When lots are laid out in a city with an established frontage, those who purchase inside lots do so with the expectation that the owners of corner lots will build in accordance with the established frontage; and if they change their frontage, and so build as to cause the rear of their lots to abut upon the inside lots, equity will so control the location of their out buildings as to prevent them from interfering with the enjoyment of the occupant of the inside lots.

Appeal from the Council Bluffs Superior Court.

WEDNESDAY, DECEMBER 5.

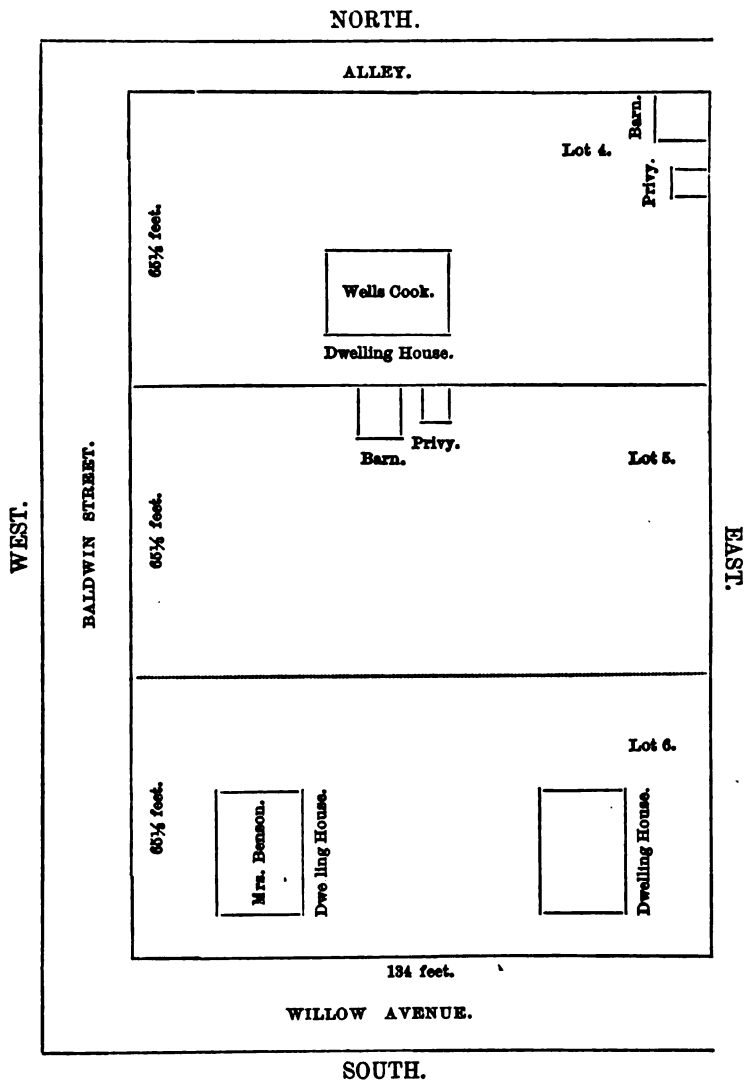
THIS is a proceeding in equity for a decree declaring the defendant's stable and privy a nuisance, and for an injunction perpetually restraining and enjoining the defendant from keeping and maintaining the same. The court dismissed the plaintiff's petition. The plaintiff appeals.

Jacob Sims, for appellant.

Wright & Baldwin, for appellee.

DAY, CH. J.—The location of the plaintiff's and defendant's premises is indicated by the accompanying plat.

Cook v. Benson.



As shown by the plat, the lots were so laid out as to front west on Baldwin Street. The defendant, however, owning two lots, one of which abuts on Willow Avenue, on the south, erected upon the south lot two buildings fronting south, and

thus, in effect, changed her two lots from a west to a south front, causing the rear of the lots to abut upon plaintiff's lot. The defendant erected her barn and privy within a few inches of the north side of the north lot, and about twelve feet from the plaintiff's house. Respecting the location of the buildings, Mrs. Caroline Cook, the wife of the plaintiff, testified as follows: "The south windows that are near her premises are my bed room and dining-room windows, buttery and kitchen windows, also a dining-room door exactly opposite her barn. Mrs. Benson's barn and privy are on the lot adjoining on the south, right close to the line fence. I should think they were ten or twelve feet from our house. Her barn and privy are immediately south of my room and the one above mine, which is also a sleeping room. The dining-room is right back of my room, and the kitchen is right back of that, east, all through in a line adjoining her lot."

A barn and privy are not necessarily nuisances, but they may become such by their location and the manner in which they are maintained. Mrs. Cook further testified: "I have always noticed an offensive smell arising from these buildings, and we have reported it again and again. * * * If the doors are open from my room across the hall, four feet square, into the parlor, this smell goes into that. The south door is exactly opposite her barn, and the north door opposite that; and the table always sits between these doors; there is no other place for it. We have been hindered seriously by flies and effluvia from that barn. We had boarders there in the summer that have requested that the door be shut while they were eating." Other occupants of plaintiff's house testify that they have noticed offensive smells and vapors coming from defendant's barn and privy. That these buildings do occasion offensive and annoying smells, which are very noticeable in the plaintiff's house, is, we think, established by a clear preponderance of the testimony.

When lots are laid out in a city with an established front, those who purchase inside lots do so with an expectation that

Beeson v. The Chicago, Rock Island & Pacific R'y Co.

the owners of corner lots will build in accordance with the established frontage. They do not expect that the owners of corner lots will change the frontage, and cause the rear of their lots to abut upon the adjoining lots. And, if they do so, equity will so far control them, in the location of their out buildings, as to prevent them from materially interfering with the enjoyment of adjoining property. The defendant's barn and privy, located within twelve feet of the plaintiff's dining-room door, are nuisances, and they must be removed, either to the east end or to the south side of lot five, as this defendant may elect. A decree will be entered in this court or in the court below, at the plaintiff's option, in harmony with this opinion.

REVERSED.

62	173
82	608

BEESON v. THE CHICAGO, ROCK ISLAND & PACIFIC R'y Co.

1. **Practice in Supreme Court:** ERROR NOT URGED IN ARGUMENT NOT CONSIDERED. A cause will not be reversed on account of an error which, though assigned, is not alluded to in the argument.
2. **Railroads: PERSONAL INJURY: EJECTMENT FROM PASSENGER STATION.** It appears from the evidence in this case that plaintiff was a woman of ill-repute, and had on prior occasions conducted herself about the defendant's passenger station in a lewd and indecent manner, and that, in the evening of a certain day, at a time when, by the defendant's rules, the ladies' waiting room was closed, and several hours prior to the departure of the train on which she said she was about to travel, she, by some artifice, had gained admission to the waiting room, and that, for misconduct therein, she was removed by the police at the request of defendant's agent, but without any force whatever; and it was *held* that, if plaintiff was entitled to a verdict at all, it was only for nominal damages, and a verdict for \$175 should be set aside.

Appeal from Polk Circuit Court.

WEDNESDAY, DECEMBER 5.

ACTION to recover damages for an alleged personal injury.

Beeson v. The Chicago, Rock Island & Pacific R'y Co.

The cause was tried by jury, and a verdict of \$175 was returned for the plaintiff, upon which judgment was rendered. Defendant appeals.

T. S. Wright, for appellant.

Baylies & Baylies, for appellee.

ROTHROCK, J.—The plaintiff claims in her petition that on the evening of the twenty-fifth of November, 1881, she went to the defendant's passenger station at Des Moines, for the purpose of taking a train over defendant's road for Grinnell, where she had been summoned to see her child who was sick; that when she arrived at the station the ladies' waiting room was locked, and she was compelled to occupy the gentlemen's room, in which were a large number of men, many of whom were smoking, the room being full of smoke, and warm and offensive; that thereafter one of defendant's employes, having charge of said room, unlocked the ladies room, and permitted the plaintiff to enter the same with other ladies, and afterwards another lady, with whom plaintiff had no acquaintance, demanded and gained admittance into said room; "that thereafter, and before said train for Grinnell arrived, and while plaintiff was rightfully in said room, and without fault on her part, defendant's employe caused the plaintiff and the said last named lady—Mrs. Brown—to be arrested by a policeman, and forcibly ejected from said waiting room and depot, and to be confined in the jail of Polk county until the next day, when they were discharged.

The plaintiff, and the woman designated in the petition by the name of Brown, were the only witnesses examined in behalf of the plaintiff to prove the allegations of her petition. At the close of their examination, defendant moved to strike from the evidence all that part touching the imprisonment of the plaintiff in the county jail, and all evidence as to the arrest of the plaintiff, because there was no evidence showing or tending to show that any officer, employe or

agent of defendant caused or directed the arrest and imprisonment. The motion was overruled.

This motion should have been sustained. But we cannot reverse the judgment because of this ruling, for the reason that, although error is assigned thereon, the assignment is not alluded to in the argument.

We merely allude to this error as showing that, if the motion had been sustained, it would have divested the case of much that afterwards tended, as we believe, to confuse the jury, and result in a verdict which, it is clear to our minds, should not have been returned. The testimony of the two witnesses above referred to did not show that any employe of defendant ordered the arrest or imprisonment of plaintiff. The most that can be claimed from this evidence is, that an employe of defendant ordered and directed the police to remove the plaintiff and the other witness from the waiting room.

After the motion was overruled, the defendant introduced its evidence, from which it appears that the plaintiff and her witness were women of the town, well known to the police as street walkers and prostitutes, and that the employe at the station who ordered their removal had before that seen the plaintiff at the station, on which occasion she used foul and indecent language to him, and that plaintiff "had been loafing about the room several days;" that the defendant had a regulation that the ladies' waiting room should be closed at seven o'clock in the evening, and it was sometimes opened again in the night, and sometimes not opened until morning, and that, upon the evening of the alleged wrong and injury upon the plaintiff, the room was locked at seven o'clock, and a woman with two children were admitted to the room a short time afterwards, and the key was given to her, with directions to admit no other person. The plaintiff by some means entered the room at the same time. Afterwards the woman Brown appeared on the outside and demanded ad-

1. PRACTICE
in supreme
court: error
not argued
not con-
sidered.

2. RAIL-
ROADS: per-
sonal injury:
ejection
from pas-
senger
station.

mittance, and by some means she effected an entrance. A policeman appeared on the outside, and there was a commotion in the room. The lady with the children was crying and protesting that she did not want to stay in the room with such characters, and the employe told the plaintiff and her witness that they would have to go out. They refused to go, and the employe then ordered the police to put them out. The police removed Mrs. Brown, and the plaintiff followed her without any force. In fact, she stated upon her examination as a witness that she was not touched, and that no force was used to remove her.

There is no evidence in the case which in the least degree tends to show that any employe of the defendant acted wantonly or oppressively in ordering the removal of the plaintiff and her witness. The evidence all tends to show that the person who had charge of the waiting room did no more than order the removal of persons whom he supposed had no right to remain there. And it is very questionable whether the plaintiff had any right to be or remain in any waiting room of the defendant at the time she was ordered to go out. The train upon which she claimed she wanted to travel was not due for at least two hours after the occurrence of which she complains. It may be that a respectable woman might have been justified in leaving her home and spending from two to four hours in the waiting room at a passenger station in the same town, to take a train in the night, in order to avoid walking upon the streets in the darkness. But the evidence shows that plaintiff was not that kind of a person.

It is idle to claim that either the plaintiff or her witness conducted herself as became a respectable woman. They each had two or three names which they used as occasion required. The woman Brown was known at times as "Missouri Kate," and the plaintiff, when taken to the police station, gave her name as "Zora Byers."

The jury, in answer to certain special interrogations, found that the plaintiff was not entitled to any damages for her ar-

rest and imprisonment. But they found that she was entitled to \$175 for being removed from the waiting room.

If it be conceded that the plaintiff was entitled to recover at all for being ordered to leave the room, and leaving without any assault upon her, (a proposition which we need not determine,) there was no evidence in the case which warranted a verdict for more than nominal damages. And if the court had sustained the motion to strike out the evidence as to the arrest and imprisonment, there would have been no occasion to instruct the jury upon the question of bodily pain and suffering and outrage and indignity put upon her, etc. We cannot resist the conclusion that the jury must have been misled and confused by instructions upon a state of case which had no warrant in the evidence. If they were not misled, their verdict is grossly excessive, under the facts disclosed in this record.

We have not alluded to the assignments of error in detail, nor pursued the order of the arguments of counsel in the discussion of the case. We have rather given our views upon an examination of the whole record, and we may say in conclusion that there was nothing in the case to justify the jury in returning a verdict for more than nominal damages; and it is exceedingly doubtful whether the case was entitled to even that much consideration.

REVERSED.

ELLSWORTH V. LOW, ADAMS & FRENCH ET AL.

1. **Tax Sale: REDEMPTION FROM: WHEN RIGHT EXPIRES.** The right to redeem land sold for taxes expires in ninety days after completed service of the notice required by section 894 of the Code, whether the deed is then executed or not.
2. ———: **NOTICE TO REDEEM ON PERSON IN POSSESSION: WHAT CONSTITUTES POSSESSION.** Where land sold for taxes was not fit for cultivation; and was not occupied by any one, but was used by the owner, who lived in the same county, for a timber lot, from which he cut timber and got his wood until the timber and wood were all removed, *held* that he was in possession of the land in such sense as to be entitled to personal service of the notice to redeem from the tax sale, under section 894 of the Code, and that service by publication only, in such case, was not sufficient to cut off the right of redemption.
3. **Evidence: "STUB" OF REDEMPTION CERTIFICATE: EX PARTE ENTRY THEREON.** The "stub" of a redemption certificate, kept in the county auditor's office, is a "record" belonging to that office, and is, by section 905 of the Code, made evidence of the matters which appear therein; but an entry thereon purporting to cancel the redemption, because inadvertently allowed by the auditor after the time therefor had expired, cannot bind the redemptioner, without his acquiescence.
4. ———: **SECONDARY SUFFICIENT WHEN NOT OBJECTED TO.** A fact may be established by secondary evidence when no objection is made and the best evidence is not demanded.
5. **Tax Sale: REDEMPTION BY MORTGAGEE.** One who has a mortgage interest in land may redeem it from tax sale, and, if the mortgagee is dead, his administrator may redeem.
6. ———: **REDEMPTION BY ONE OF SEVERAL LIEN HOLDERS INURES TO BENEFIT OF ALL.** Where several persons have liens upon land sold for taxes, and one of the lien holders redeems, the title of and liens on the land stand and exist thereafter in the same manner as though no sale for taxes had ever been made.

Appeal from Wright Circuit Court.

WEDNESDAY, DECEMBER 5.

THE plaintiff, claiming to be the owner of certain real estate under a tax deed, commenced this action to restrain the defendants from selling the same under execution against

 Ellsworth v. Low, Adams & French et al.

a former owner. Judgment for defendants, and plaintiff appeals.

S. M. Weaver, for appellant.

Ladd and Peterson, for appellee.

SEEVERS, J.—I. The validity of the tax deed depends upon the question whether redemption was made prior to the expiration of ninety days after completed service of the notice required by section 894 of the Code. The notice was by publication in a newspaper, and the service was completed by making the required affidavit, on the 25th day of August, 1880, and filing the same in the office of the county treasurer. The redemption is claimed to have been made on the 24th day of November, 1880, which was ninety-one days after the completed service of the notice. The deed, however, was not executed until the 27th day of November, 1880. But the right to redeem expired on the 23d day of November, 1880, whether the deed was executed then or not. *Pearson v. Robinson*, 44 Iowa, 413. The deed is *prima facie* evidence that the notice had been properly and sufficiently served on the right person. Code, § 897, *Reed v. Thompson*, 56 Id., 455. This being so, the burden is on the defendant to show that it was not so served. The statute requires the notice to be served “upon the person in possession of the land, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided by law for the service of original notices.” Code, § 894.

1. TAX SALE:
redemption
from : when
right expires.

2. —: notice
to redeem on
person in
possession :
what consti-
tutes posses-
sion.

Under the foregoing, if the person in possession, or to whom the land is taxed at the time the notice is served, resides in the county, the notice must be personally served on him; but if he is a non-resident of the county, the service may be made by publication in a newspaper. In the case at bar, the notice was served by publication only. It is insisted

that this is insufficient, because one Dennison was in possession, and the land was taxed to him at the time the notice was served as above stated. We are unable to find that there is any evidence tending to show to whom the land was taxed in August, 1880. The evidence as to any one being in possession of the land is as follows: "One Dennison owned the land at the time it was sold for taxes, and he then, and has ever since, resided in the county in which the land is situated. Dennison bought the land for a wood lot; he got his wood there for several years, and conveyed the land back to Warren. No one lived on the land * *. It is unfenced brush land—timber has been taken off. No one saw Dennison on the land, but he was seen hauling wood therefrom. It never was occupied nor used by any one except for the timber, and since that has been taken off nothing has been done on it." When Dennison ceased to take wood or timber from the land does not certainly appear. The land was evidently unsuitable for cultivation, and was used for and as a timber lot. The possession of Dennison was such as is usual in such cases. He took timber therefrom from time to time as he desired, and such use, occupation and possession was, we think, sufficient to put any one on inquiry as to why or under what right the possession was claimed. As Dennison was in possession at the time the land was sold for taxes, and he was then the owner, his possession must be presumed to have continued until the contrary appears. We think it sufficiently appears that Dennison was in possession at the time the foregoing notice was published, and that, as he was a resident of the county, it should have been served on him. Because it was not, the right of redemption was not cut off.

II. The defendants claim that the redemption was made by Otis Warren, administrator. The county auditor was a witness, and a record or book containing the redemption from tax sales was brought into court by him, and the defendants offered in evidence the "stub" of a redemption certificate describing the land in controversy. This evidence is objected to as incompetent, and be-

3. EVIDENCE:
"stub" of re-
demption cer-
tificate: ex
parte entry
thereon.

cause it is a record not known to the law. But we think otherwise. It is a "record belonging to the office of the county auditor," and is by statute made evidence of the matters stated therein. Code, § 905. The "stub" so introduced shows that redemption had been made by Otis Warren, administrator. Across the face of the stub there was written the following: "This redemption canceled by reason of the time specified by the Code of Iowa having expired, and that fact not noticed by me at the time redemption was made or being made." This was signed by the county auditor, and is dated three days after the redemption was made. It is evident that the party making the redemption is not bound by this action of the auditor, unless he or his agent acquiesced therein and surrendered the certificate and received the money paid as for redemption. We find the fact to be from the evidence that the certificate was not returned or the money refunded.

The evidence shows that Isaiah Warren at one time owned the land, and he conveyed to Dennison, who executed a mortgage to Isaiah Warren to secure the purchase money. At the time redemption was made, the mortgage was in force and unpaid. The mortgage was introduced in evidence. The evidence shows that Isaiah Warren is dead, and Otis Warren is his administrator. It is objected that this evidence is insufficient to prove the fact of the death of Isaiah Warren, or that Otis Warren is administrator. But as no objection was made to the evidence introduced in the court below, we think the objection now made that it is not the best evidence comes too late. Of course, any one who knows the fact of the death of a person may testify thereto; and a witness testified that Isaiah Warren had been dead for several years. If an objection had been made, there was record evidence of the appointment of an administrator. The defendants might have been

4. —, secondary sufficient when not objected to.

able to bring in the record. Otis Warren, administrator of
 5. **TAX SALE:** Isaiah Warren, had the right to redeem because
 redemption by mortgagee. of his mortgage interest in the real estate, and
 we find that he did so.

III. The defendants are judgment creditors of Dennison,
 and this judgment is a lien on the land. The redemption
 6. —: re- redemption by made by Warren will inure to their benefit.
 one of several When the redemption was made, the title and
 lien holders inures to
 benefit of all. liens on the land thereafter stood and existed in
 the same manner as though no sale for delinquent taxes had
 ever been made.

AFFIRMED.

THE AMERICAN EMIGRANT CO. V. CLARK ET AL.

1. **CONVEYANCE: NOT DEFEATED BECAUSE EMBODIED IN A CONTRACT.** It is not essential that a deed of conveyance should follow any prescribed form of words; and if the intention to convey is unmistakably expressed, it will not be defeated by the fact that the instrument also partakes of the nature of a contract.
2. —: **CERTAINTY IN DESIGNATING GRANTEE.** Where a conveyance partakes also of the nature of a contract, and, taking the whole instrument together, there can be no uncertainty as to the person to whom the conveyance is made, it will not be defeated simply because the grantee is not formally named in the conveying part of the instrument.
3. —: **CERTAINTY AS TO THE LAND CONVEYED.** Where a conveyance is embodied in a contract, and from the whole instrument it clearly appears what land was intended to be conveyed, the land will pass thereby, though not particularly described, and though reference to another deed may be necessary to ascertain the particular description thereof.

Appeal from Kossuth District Court.

THURSDAY, DECEMBER 6.

THIS is an action in equity to quiet title to certain forty acres of land. The defendants filed a general demurrer to the petition, which the court sustained. The plaintiff appeals.

Harvey & Davis, for appellant.

Coolbaugh & Call, J. Harry Call and Whiting S. Clark, for appellees.

DAY, CH. J.—The plaintiff's petition is as follows:

"1. The plaintiff, the American Emigrant Company, alleges that it is a corporation, created by and existing under the laws of the state of Connecticut.

"2. Plaintiff alleges that it is the owner in fee simple of the following described premises, situated in Kossuth county, Iowa, to-wit: The east half of the northwest quarter of section twenty-nine (29), in township ninety-seven (97) north, of range twenty-eight (28) west of 5th P. M.

"3. That the said land is swamp land, within the meaning of the act of Congress of September 28, 1850, and was by said act granted to the state of Iowa.

"4. That said land was by the act of General Assembly of the state of Iowa, passed January 13, 1853, granted to the county of Kossuth, and thereafter, on the 17th day of May, 1867, the same was patented as swamp by the state of Iowa to the county of Kossuth.

"5. That the said land, with others, had by the selecting agent of Kossuth county been selected and reported as swamp, and thereafter, on the 8th day of February, 1862, one Asa C. Call entered into a contract with Kossuth county with reference to the swamp lands of Kossuth county, by virtue whereof said Call was to receive one-fourth of all said swamp lands.

"6. And afterward, on the 28th day of July, 1862, in pursuance of said contract, the lands inuring to said Call thereunder were designated and set apart to him, and, among others, the land in controversy was designated as inuring to said Call, and thereafter, on the first day of September, 1862, the said county, by warranty deed, conveyed said land, with others, to said Asa C. Call, and said deed was thereafter, on

the 25th day of November, 1868, filed for record and recorded on page 267 of book 4 of the records of deeds of Kossuth county, Iowa.

"And, on the 24th day of March, 1866, the said Asa C. Call made, executed and delivered his deed of conveyance to the American Emigrant Company, plaintiff herein, in words and figures as follows, to-wit:

"Agreement made and concluded this 24th day of March, A. D. 1866, by and between the American Emigrant Company, by its general agent, F. C. D. McKay, of the one part, and Asa C. Call, of the county of Kossuth, of the other part, as follows, to-wit:

"The American Emigrant Company are the owners of three-fourths of the swamp and overflowed lands, and claim on the general government for the swamp and overflowed lands, and cash and scrip indemnity for the same, of the county of Kossuth, in the state of Iowa.'

"The said Call has a contract with the said county for the remaining fourth of all the swamp and overflowed lands, and cash and scrip indemnity for the same, of the county, and owes the county, as a part of the consideration therefor, about fourteen hundred dollars. The company have purchased all of said Call's interest, and agree to pay him therefor the following prices, on the terms and conditions herein specified: The company agree to pay him at the rate of thirty cents per acre for all lands and indemnity which the said company shall finally realize out of the one-fourth interest claimed by Call; one thousand dollars of which is herewith paid to said Call in a draft on the treasurer of the company, payable sixty days after sight, the receipt of which is hereby acknowledged; fourteen hundred dollars of which purchase money is to be by the company reserved out of and from the money to be paid the said Call, to enable the company, in whole or in part, to purchase the said land of Kossuth county, in case the said contract between Call and the company should be violated; and the balance, if any there be, after taking out the said

twenty-five hundred dollars of the purchase money, to be due and payable to the said Call as soon as it can be definitely ascertained what amount of lands are acquired by the company out of Call's interest. In case there should be a delay in the final settlement with the Government, or any parties, it is agreed that the excess of the purchase money, over and above the said twenty-five hundred dollars, shall be paid the said Call at the end of each and every year from this date, from time to time, as the title to the lands is acquired by the company. If at any time the company deem it necessary, the said Call will, upon request, make and execute to said company any further or different conveyance of his interest in said lands, with or without lists, and will, if requested, release to the county or the company all claim to any interest in the same under this contract. This contract is to operate as a conveyance of all remaining interest of whatever character which the said Call now has, or may hereafter acquire, in any of the said lands or claims for indemnity, (which interest and claim has been duly examined and is understood by the company,) by virtue of his contract with the county before alluded to, but nothing in the foregoing instrument contained shall make said Call personally liable in case of a failure of title to any of said land.



"In testimony whereof we have hereunto affixed our hands this twenty-fourth day of March, 1866.

ASA C. CALL.

"State of Iowa, }
County of Polk. } ss:

"On the 24th day of March, A. D. 1866, before me, Seward Smith, a notary public in and for said county, personally came Asa C. Call, personally to me known to be the identical person whose name is affixed to the above instrument as grantor and maker thereof, and acknowledged the execution thereof to be his voluntary act and deed for the purpose

therein expressed. Witness my hand and official seal the day and year above written.

[SEAL.]

“SEWARD SMITH, *Notary Public*”—

which instrument was duly filed for record on the 21st day of December, 1868, and recorded in book 4, pages 283 and 284, of the deed records of Kossuth county, Iowa.

“That the land in controversy had not been sold or otherwise disposed of by said A. C. Call at the time of making said conveyance with the plaintiff, but remained to said Call, and passed to plaintiff under the operation of said conveyance.

“9. That the defendants, as plaintiff is credibly informed and believes, make some claim to said land adverse to the estate of the petitioner, and that said claim is based upon a quit claim deed from said Call to defendant, A. D. Clark, bearing date August 13, 1878, and recorded August 13, 1878, in book 11, page 44, of the deed records of Kossuth county.

“10. That the defendant, Mary J. Clark, claims under a quit claim from said A. D. Clark, of date January 23, 1879, which deed is recorded January 23, 1879, in book 11, page 554, of the deed records of Kossuth county, Iowa. Wherefore plaintiff prays that its estate in said lands be established as against the adverse claims of defendants, and that the defendants be barred and forever estopped from having or claiming any right or title to the premises adverse to the plaintiff, and that it have judgment for costs.”

It is insisted by the appellee that the instrument set out in the foregoing petition, executed by Asa C. Call, is a mere contract for a conveyance, and not a conveyance in itself. That

1. CONVEY- it does partake of the nature of a contract must be
ANCE: not
defeated be-
cause embod-
ied in a con-
tract. tended by the parties to it to operate as a conveyance. This is apparent from the following portion of the instrument: “This contract is to operate as a conveyance of all remaining interests of whatever character which the said Call now has or may hereafter acquire in any of the said lands or claims

for indemnity, by virtue of his contract with the company before alluded to." It is not essential that a deed of conveyance should follow any exact or prescribed form of words. If the intention to convey is unmistakably expressed, that intention will not be defeated by the fact that the instrument also partakes of the nature of a contract. The instrument in question is acknowledged as a conveyance, and was recorded as such. It would be preferring shadow to substance to refuse to give it effect, and to carry out the evident intention of the parties, merely on account of its failure to comply with the forms usually employed for such purposes. If the contract contains the other requisites of a conveyance, it ought not to be denied operation as such merely on account of its informality. It is claimed, however, that no grantee is named in the instrument, and that for that reason it cannot operate as a conveyance. The contract declares that it is an agreement

2. ____: cer- made and concluded between the American Emi-
tainty in de- grant Company of the one part, and Asa C. Call
signating the grantee. of the other part, that the company have pur-
chased all of Call's interest, and agree to pay him therefor
* * at the rate of thirty cents per acre, one thousand dol-
lars of which is herewith paid to said Call in a draft on the
treasurer of the company, and if at any time the company
deem it necessary, the said Call will, upon request, make
and execute to said company any further or different convey-
ance, and that this contract is to operate as a conveyance. If
the question should be asked, to whom is the contract to
operate as a conveyance? there could obviously be but one
answer, viz: to the company with which the contract is made,
which purchased Call's interest and paid him therefor, and to
which Call agrees to execute a further or different convey-
ance if deemed necessary. Taking the whole instrument to-
gether, there can be no uncertainty as to the grantee.

The cases cited by appellee upon this branch of the case are *Drury v. Foster*, 2 Wall., 24; *Paul v. Moody*, 7 Me., 455; and *Garnett v. Garnett's Lessee*, 7 Monroe, (Ky.), 546. The

case of *Drury v. Foster* has no application to the question. In *Paul v. Moody*, in addition to there being no grantee named in the deed, the *habendum* was to the grantor and his heirs, which constitutes quite a material defect. In *Garnett v. Garnett's Lessee*, there was a relinquishment of all right and title to land, but nothing appeared anywhere to indicate to whom the relinquishment was made. We do not deem these cases in conflict with the views above expressed.

It is further insisted, however, that the instrument does not convey the property in controversy. It is claimed by appellee that the petition alleges that the land in controversy was conveyed to Call on the first day of September, 1862, whereas this instrument was executed on the 24th day of March, 1866, and refers to the lands claimed by Call, not under a deed of conveyance, but simply under contract with the county. It is evident, however, that the instrument in question refers to all the swamp and overflowed lands of Kossuth county, except the three-fourths already claimed by the plaintiff. The petition alleges that in *pursuance of said contract* the county conveyed said lands to Call. It appears from the allegations of the petition, therefore, that the lands in controversy inured to Call by virtue of his contract with the county, and the instrument declares that it is to operate as a conveyance of all remaining interests which Call now has or may hereafter acquire by virtue of his contract with the county. The instrument does, in our opinion, under the allegations of the petition, embrace the lands in controversy, although before that time conveyed to Call. It is further insisted that the contract is so indefinite and uncertain in its description that it cannot operate as a conveyance. The contract embraces all the land inuring to Call under his contract with the county. If these lands were, as the petition alleges, and as the demurrer admits, conveyed to Call on the first day of September, 1862, a reference to this deed will render certain the description in the agreement of 24th March, 1866. The court erred in sustaining the demurrer.

REVERSED.

CROSBIE ET AL V. THE CHICAGO, IOWA & DAKOTA RAILWAY
COMPANY ET AL.

1. **Railroads: RIGHT OF WAY DEED: COMPLIANCE WITH CONDITION OF ESSENTIAL.** Where plaintiffs conveyed to a railway company the right of way over their land, in consideration of the location and construction of a line of railway along a contemplated line, *held* that the grantee of said company could not, by virtue of such conveyance, use such right of way for a line of railway which did not conform in substance to such contemplated line, but which ran in a different direction.

Appeal from Hardin Circuit Court.

THURSDAY, DECEMBER 6.

THIS is an action to recover of the defendants damages for occupying the plaintiffs' premises by the defendant's line of railway. The court sustained a demurrer to the plaintiffs' reply, and rendered judgment for the defendants. The plaintiffs appeal. The facts are stated in the opinion.

Brown & Carney, for appellants.

John Porter, for appellees.

DAY, CH. J.—On the 4th day of October, 1882, the plaintiffs filed their petition in equity, alleging that defendants had commenced constructing their railroad over the plaintiffs' land, and had not procured a right to enter, nor condemned the right of way, and praying an injunction restraining defendants from constructing their road over plaintiffs' land. A writ of injunction was issued, and a motion was made to dissolve it, whereupon it was stipulated that defendants should execute to plaintiffs a bond in the sum of twenty-five hundred dollars, conditioned to pay whatever damages might finally be awarded plaintiffs for right of way; that upon the filing of the bond the temporary injunction should be dissolved, and defendants be permitted to proceed with the con-

Crosbie et al. v. The Chicago, Iowa & Dakota Railway Company et al.

struction of the road, and that plaintiffs might amend their petition, and make their action one at law to recover damages, reserving to defendants the right to claim under their alleged right of way deed. On the 30th day of October, 1882, the plaintiffs filed their amended petition, claiming damages in the sum of five thousand dollars. The defendants answered, alleging that on the 16th day of April, 1880, the plaintiffs executed their deed in writing, granting to the Iowa River & Eastern Railway Company, and its successors and assigns, the right to construct their railway across plaintiffs' land. A copy of the deed referred to is attached to the answer, and the material portion of it is as follows:

"In consideration of one dollar in hand paid by the Iowa River & Eastern Railway Company, and the further consideration of the benefits to be derived by the public and myself in the location, construction and operation of a line of railway in substantial conformity with the contemplated line of the Iowa River & Eastern Railway Company, do hereby sell, grant and convey to said Iowa River & Eastern Railway Company, its successors and assigns, the right of way through, over and across the land hereinafter described, to-wit: A strip or belt of land fifty feet in width on each side of the center line of said railway, whereon the same may be definitely located over and across the east half of the south east quarter of section seventeen, etc." The answer further alleges that on the 8th day of October, 1882, said Iowa River & Eastern Railway Company conveyed to the Chicago, Iowa & Dakota Railway Company, defendants, its said right of way, and all rights and privileges conveyed to it by said plaintiffs. A copy of said deed is attached to the answer, and the material portion of it is as follows. "Whereas the Iowa River & Eastern Railway Company, a corporation heretofore organized under the laws of Iowa, for the purpose of constructing a line of railway as provided by its article of incorporation,

* * * *

and whereas, at a meeting of the stockholders and of the directors of said Iowa River & Eastern

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Railway Company, held on the 11th day of July, A. D. 1882, a resolution was duly adopted, authorizing and directing proper conveyances to be made of all and singular all right of way and other property then owned and held, or to which it had any right or interest, to the Chicago, Iowa & Dakota Railway Company: Now, therefore, the said Iowa River & Eastern Railway Company hereby sells, assigns, grants and conveys to the said Chicago, Iowa & Dakota Railway Company, its successors and assigns, all and singular all lands, lots, easements, right of way, maps, plats, field-notes, profiles, surveys, and benefits of every kind and nature, real and personal, belonging or in any way appertaining to said Iowa River & Eastern Railway company; *provided*, however, that said Chicago, Iowa & Dakota Railway company, its successors and assigns, should construct, maintain and operate its proposed line of railway in substantial compliance, and as near as may be practicable, upon the line contemplated by the Iowa River and Eastern Railway company."

The plaintiffs filed a reply containing, among others, the following allegations: "That prior to April 16, 1880, a corporation, known as the Iowa River & Eastern Railway Company, had formed a preliminary organization to construct a railway from Eldora southeasterly to some railroad having an easterly connection, making Eldora and Iowa Falls points by its charter. That said Iowa River & Eastern Railway Company did not construct said railroad, or do more than to partially survey their route and procure a few right of way deeds. That afterward this defendant was organized and incorporated, and, by their charter, Iowa Falls is not made a point, nor does it run in the same direction as the line of the Iowa River & Eastern Railway Company, nor are they the lessees, purchasers or assignees of the Iowa River & Eastern Railway Company, but an independent company, having an independent line from that of said Iowa River & Eastern Railway Company. The defendants demurred to this reply, and the demurrer was sustained. It is to be observed that the plaintiffs'

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deed of right of way to the Iowa River & Eastern Railway Company is upon consideration of the benefits to be derived in the location, construction and operation of a line of railway in substantial conformity with the contemplated line of the Iowa River & Eastern Railway Company. The conveyance from the Iowa River & Eastern Railway Company to the Chicago, Iowa & Dakota Railway Company is upon the proviso that the said Chicago, Iowa & Dakota Railway Company shall construct, maintain and operate its proposed line of railway in substantial compliance, and as near as may be practicable, upon the line contemplated by the Iowa River & Eastern Railway Company. A compliance with these conditions is certainly essential to the right of defendant to claim the right of way under the deed of plaintiffs in question. The reply, however, alleges that the defendant has an independent line from that of the Iowa River & Eastern Railway Company, and one which does not run in the same direction. Surely, an independent line, running in a different direction, is not one in substantial conformity with the contemplated line of the Iowa River & Eastern Railway Company. The defendants insist in argument that the line is constructed upon the contemplated line of the Iowa River & Eastern Railway Company. But the reply alleges that the road in question is not so constructed, and, for the purpose of this appeal, the demurrer admits the truth of the allegations in the reply. The court erred in sustaining the demurrer.

REVERSED.

LA MONT V. THE ST. LOUIS, DES MOINES & NORTHERN R'Y CO.

1. **Railroads: RIGHT OF WAY: DAMAGES: EVIDENCE.** The land in question was not a desirable tract, was situated more than two miles beyond the limits of the city of Des Moines, and was approached from the city by way of Greenwood Avenue, but lay more than a mile from that avenue, and eighty rods south of the line of the avenue extended westward. On the question of damages to plaintiff caused by taking the right of way over the land, *held* that evidence to the effect that Greenwood Avenue was a good road by which to approach the land was proper, but that evidence as to the superior character of the improvements upon said avenue was not proper to be admitted, it not appearing that the land is likely to be in demand in the near future for residence purposes.

Appeal from Warren Circuit Court.

THURSDAY, DECEMBER 6.

THE defendant, in locating and constructing its railroad, desired the right of way across a tract of land of forty acres, the property of plaintiff. The parties not being able to agree upon the compensation to be paid to the plaintiff, commissioners were appointed by the sheriff of Polk county, where the land is situated. The commissioners assessed the damages at the sum of \$500. Both parties appealed from this assessment to the circuit court, and, on defendant's application, the place of trial was changed to Warren county, where the cause was tried by jury, which resulted in a verdict for the plaintiff for \$964.50. Defendant appeals.

Parsons & Runnells, for appellant.

Baylies & Baylies, for appellee.

ROTHROCK, J.—I. The land of the plaintiff is situated about three miles and a quarter from the court-house in the city of Des Moines, and two miles in a direct line from the city limits, and two miles and fifty-two rods, by the traveled road, from the city limits. The approach to the land from

the city is by way of Greenwood Avenue to the fair grounds, and from that point by the old state road from Des Moines to Council Bluffs, which runs partly along the east line of the land in controversy. The land is situated one mile and fifty rods from Greenwood Avenue, by the traveled road. The evidence shows that the premises in controversy are not in all respects a desirable tract of land. The plaintiff testified that there was probably an acre and a half, at a creek which runs through the land, that could not be cultivated, and that four acres of the northeast corner are very rough and steep. The land, so far as it had been cultivated at all, had been used for market gardening and the raising of fruit; and the taking of the right of way destroyed some young apple trees and some strawberry plants. It will be observed from the foregoing statement that the land of the plaintiff is not upon nor adjacent to Greenwood Avenue. If Greenwood Avenue were extended west, it would pass eighty rods north of the land.

The plaintiff, while upon the stand as a witness, was asked to describe to the jury what character of highway Greenwood Avenue is, and "as to how it is arranged," and as to the character of improvements along that avenue, and how it was laid out. Another witness was asked substantially the same questions. The witnesses were allowed to state, over defendants objection, that said avenue was graded and widened about one hundred feet three years before that, and the land along the avenue was laid out in small tract for residences, and that it had finer improvements upon it than any other street running out of Des Moines.

We think that, in view of the whole record in this case, taking into consideration the character of plaintiff's land, the purposes for which it had been used, and its remoteness from Greenwood Avenue, this testimony should not have been allowed to go to the jury.

It is true that in proceedings of this character it is competent to show the situation and general surroundings of the land to which the controversy relates, whether it may be ap-

proached by good or bad roads, and the like. And, so far as the testimony related to Greenwood Avenue being a good road from Des Moines to plaintiff's land, the evidence was proper. It was also proper to show that the land is in the vicinity of a city, because this usually enhances the value of lands. But this evidence, so far as it relates to the fine improvements upon the avenue, and to the fact that the adjacent lands had been laid out into small tracts, appears to us to have been an effort upon the part of the plaintiff to present to the jury the idea that his land was especially valuable for the same purpose. The plaintiff's land had not been in demand for mere residence purposes, and there is nothing in the record to show that it will be in such demand in the near future, and it is present value and adaptability which determines the compensation to the owner in proceedings of this character.

We have examined this record through with care, and have to say that we cannot hold that this error was without prejudice. The amount of the verdict, and the great differences between the witnesses as to the damages to the plaintiff's land, lead us to think that the fact that land on Greenwood Avenue was very valuable had much to do in moulding the judgment of some of the witnesses, who testified that the difference in the value of the land before and after the appropriation of the right of way was from \$2,000 to \$2,500.

It is unnecessary to examine the other alleged errors. It may be proper to say, however, that we find no error in the instructions given by the court to the jury.

REVERSED.

WILLIAMSON ET AL. V. WACHENHEIM ET AL.

1. **Original Notice: SERVICE BY PUBLICATION: RETRIAL.** Where the service of the original notice is by publication only, parties legally representing the defendant may have a retrial of the cause, upon application made therefor within two years after judgment. Code, § 2877. In this case, where the title to real estate was involved, the widow and children of the defendant were entitled to such retrial.

Appeal from Warren District Court.

THURSDAY, DECEMBER 6.

ACTION in equity to set aside a conveyance of real estate by the defendant, Wachenheim, to one Mattes, on the ground that it was made to hinder and delay creditors. The relief asked by the plaintiffs was granted, and the defendants appeal.

J. R. Barcroft, for appellants.

Henderson & Berry, for appellees.

SEEVERS, J.—I. The plaintiffs procured personal service on Wachenheim, and, by publication on Mattes, a decree by default was rendered. Mattes was dead when the action was commenced. Shortly after the decree was rendered, the widow of Mattes obtained knowledge thereof, and in her own name, and in the names of her children as heirs at law of Mattes, intervened in the action, and in substance asked that it be retried, and her title to the property in controversy quieted. To this petition there was an answer filed, and the cause was heard on the evidence introduced by the parties.

Counsel for the appellees insist that, as the petition of intervention was not filed until after final decree, it was filed too late, and that the intervenors could only have their rights adjudicated by an original petition in equity. The service on Mattes was by publication only, and the statute gives a party, or

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any person legally representing him, a right to have the action retried, if an application therefor be made within two years after the rendition of the decree. Code, § 2877. In our opinion the proper remedy was pursued.

II. Counsel for the appellees further insist that the facts are the same as in *Williamson v. Wachenheim*, 58 Iowa, 277; and, as the conveyance in that case was held to be fraudulent, the same result must follow in this case. The claimed proposition is to an extent true. As to Wachenheim the conveyances in both cases may be considered to be fraudulent. In the cited case, it was found that Boehler had knowledge of the fraud and participated therein. We are unable to find, after a careful examination of the evidence by each of us, that Mattes had such knowledge, or participated in the alleged fraud. We deem it unnecessary to state the evidence, or the reasons for our conclusions, and such is not our custom.

The cause will be remanded to the district court with directions to enter a decree in accord with this opinion, or either party can have a decree in this court.

REVERSED.

SCHUCHART V. LAMMEY.

1. **Venue: CHANGE OF FROM CIRCUIT TO DISTRICT COURT: JURISDICTION.**

The circuit court has exclusive jurisdiction of all appeals from justices of the peace in civil cases. Code, § 162. Hence, when it is desired to change the place of trial of such appeal, it must be removed to the circuit court of another county, and not to the district court. A removal to the district court can be had, under section 2592 of the Code, only in cases of which the courts have concurrent jurisdiction.

Appeal from Dallas District Court.

THURSDAY, DECEMBER 6.

ACTION commenced before a justice of the peace to recover the possession of specific personal property consisting of

wine and beer, and certain kegs containing the same. The defendant, among other things, pleaded that he was marshal of the incorporated town of Perry, and that he had seized the property in controversy under legal process issued under and in pursuance of an ordinance of said town and the statutes of the state. There was a trial before the justice, and judgment for plaintiff. Thereupon the defendant appealed to the circuit court, where the plaintiff filed a motion to change the place of trial, on the ground that the judge of the circuit court was so prejudiced against the plaintiff that he could not obtain a fair trial. The motion was sustained, and the cause transferred to the district court, in which court the defendant filed a motion to remand the cause to the circuit court on the ground that the district court did not have jurisdiction of the subject matter. The motion was overruled.

The plaintiff moved the court for judgment in his favor on the pleadings, which was overruled. Thereupon, "by agreement of counsel in open court, it is ordered that this cause stand continued to such time as will enable the parties to obtain the opinion of the supreme court upon the legal questions involved." Certain questions have been propounded upon which the opinion of the supreme court is asked. Both parties appeal.

Barcroft, Bowen & Sickmon and Cardell & Shortley, for plaintiff.

H. A. Hoyt and North & Barr, for defendant.

SEEVERS, J.—Among the questions certified for our consideration is one in substance as follows: Has the district court jurisdiction to try and determine a replevin cause under the circumstances above stated? This is the only question we feel called on to determine.

The circuit court has "exclusive jurisdiction in all appeals and writs of error from inferior courts, tribunals or officers." Code, § 162. A change in the place of trial in a civil action

may be had when certain specified grounds therefor exist. Code, § 2590. "Whenever the change shall be granted on account of the prejudice or disability of the judge, the action shall be transferred to the district or circuit court of the same county, unless objections exist as to both judges, in which case it shall be transferred to the most convenient county in some other district or circuit." Code, § 2592. It is under this statute that it is insisted that the district court obtained jurisdiction. But how can this be so, if the circuit court has exclusive jurisdiction? The two statutes or sections of the Code must be construed so that both can stand and have force and effect. If the district court has jurisdiction, the circuit court does not have exclusive jurisdiction, and yet the statute expressly declares that it has. It will be observed that the jurisdiction of the circuit court under the statute is not confined to original jurisdiction, but that its jurisdiction of the case or subject-matter is exclusive. The case, therefore, must be determined in and by the circuit court. Section 2592 of the Code must, therefore, be construed as referring to and embracing cases in which both courts have concurrent jurisdiction, and not to those where either court has exclusive jurisdiction. This construction gives force and effect to both sections of the Code. When the change was granted, it should have been sent to some other circuit court, and the district court erred in taking jurisdiction of the case. These views are in accord with the following cases: *McKinney v. Wood*, 35 Iowa, 167; *Keniston v. Hewitt*, 48 Id., 679; *Easton v. Fleminy*, 51 Id., 305; *Cerro Gordo County v. Wright County*, 59 Iowa, 485.

As the district court did not have jurisdiction of the cause, it did not have the power to call upon us to determine the other questions submitted. The cause will be remanded to the district court, with direction to sustain the motion and remand the cause to the circuit court for disposition in accordance with this opinion.

REVERSED.

McCLATCHEY V. FINLEY ET AL.

1. **Costs on Counter-claim :** EFFECT OF OFFER TO CONFESS JUDGMENT ON PETITION. Where the action was upon a promissory note, and the defendants pleaded a counter-claim, and afterwards offered to confess judgment for an amount less than was adjudged them upon the trial, and the trial involved only the issues raised by the counter-claim, which were found in defendants' favor, *held* that defendants were entitled to judgment for all costs made upon the trial of these issues, and that their insufficient offer to confess judgment was in no way connected with, and did not affect, this right.

Appeal from Dallas Circuit Court.

THURSDAY, DECEMBER 6.

UPON the issues joined, the plaintiff recovered a judgment; but the defendants filed a motion to tax certain costs to the plaintiff, which was overruled, and defendants appeal.

Cardell & Shortley, for appellants.

H. A. Hoyt, for appellee.

SEEVERS, J.—The action was on a promissory note, the execution of which was admitted in the answer. The defendants pleaded a partial failure of consideration, and also a counter-claim. Just prior to commencing the trial, the defendants offered to confess judgment for \$125, which the plaintiff refused to accept. The jury found for the plaintiff in the sum of \$131.15, but the issues as to the failure of consideration and counter-claim were found in favor of the defendants. Thereupon the defendants moved the court to tax certain costs to the plaintiff, which was overruled, and the following question has been certified upon which the opinion of the supreme court is desired: "Whether in an action wherein the plaintiff sues on a promissory note, the execution of which defendants admit in their answer, and plead two separate counter-

claims, to which plaintiff replied, denying the same, but on which the defendants were successful, and defendants before the trial made an offer to allow judgment to be rendered against them in favor of the plaintiff for an amount less than was found due the plaintiff by the jury, which offer plaintiff refused to accept, did the defendants by making said offer waive their right to have the costs of the trial of the issues joined on said counter-claim taxed to the plaintiff?"

If no offer to confess judgment had been made, the costs incurred on the issues found in favor of the defendants should have been taxed to the plaintiff. Code, § 2933. *Hall v. Clayton*, 42 Iowa, 526; *Judd & Co. v. Day Brothers*, 50 Id., 249. The circuit court seems to have been of this opinion, but concluded that the defendants, by making the offer to confess judgment, waived their right to costs, no matter what the jury might find as to the issues involved, if the offer to confess was insufficient in amount.

We do not think this is so. If the offer to confess judgment was sufficient in amount, then the defendants were entitled to costs, no matter whether the issues were found in their favor or not. But, as the offer was insufficient, it has no effect on the question of costs. As, however, the issues were found in favor of defendants, they are entitled to costs, on the ground that they were successful as to the only matters litigated in the determination of which the costs were incurred.

The offer to confess judgment, as it affects costs, and the determination of the issues affecting the same thing, are two independent matters, which have no connection with each other, and the right to costs under one has no bearing on such right under the other.

As we understand the question certified, it must be answered in the negative; that is, nothing was waived by the offer to confess.

REVERSED.

AMERICAN & CO. V. FRANK ET AL.

1. **Assignment for Benefit of Creditors: TIME OF DELIVERING AND FILING DEED: PRESUMPTION.** Where it becomes material to determine whether a deed of assignment was delivered prior to the levy of an attachment, it may be presumed, in the absence of any showing to the contrary, that the deed was delivered to the assignee thirty seconds before he caused it to be filed for record in the recorder's office.
2. ———: **DELIVERY OF DEED: WHAT CONSTITUTES: PROPERTY PASSES WITH DELIVERY: RECORDING.** Where the assignors duly executed and acknowledged the deed of assignment, and the assignee accepted the trust, and directed the attorney of the assignors to do whatever was necessary to perfect the assignment, *held* that this constituted a delivery of the deed to the assignee, and carried with it the title to the property; and the fact that the deed was not filed for record by the attorney until after the levy of an attachment upon the property, did not give priority to the attachment—the provision for the recording of the assignment being intended, not for the benefit of existing creditors, but for the protection of subsequent purchasers.

Appeal from Polk Circuit Court.

THURSDAY, DECEMBER 6.

THE plaintiff commenced an action against the defendants, and caused to be attached a certain stock of goods. Ben Cohen intervened in the action, and claimed that he was entitled to the possession of the attached property, under a general assignment of Frank and Son for the benefit of creditors. The cause was tried to the court, and judgment was rendered in favor of the intervenor. The plaintiff appeals.

Brown & Dudley and *John Mitchell*, for appellant.

Callander & Smith and *Macy & Sweeney*, for appellee.

DAY, CH. J.—The court found the facts of the case to be as follows: “1. That the assignee, at the request of Frank & Son, consented to accept the trust between seven and eight o'clock A. M., November 7, 1881.

"2. That Frank & Son, in contemplation of insolvency, duly executed and acknowledged a general assignment for the benefit of all their creditors, after eight and before nine o'clock A. M. of said day.

"3. That said assignment was filed for record by the attorney of Frank & Son, on the direction of the assignee to do whatever was necessary to perfect the assignment, at fifty-three minutes after nine o'clock A. M. of said day, and so indorsed by the recorder.

"4. That an attachment against the property of Frank & Son, in favor of Goldsmith & Co., was placed in the sheriff's hands at forty minutes after eight A. M., and levied at nine A. M. of said day on the stock of merchandise, subject to an execution in favor of I. Sheffell, and an attachment in favor of Swiskey, then in the sheriff's hands.

"5. That the plaintiff's attorney examined the records and the files of the recorder's office, and, finding no assignment, immediately thereafter, to-wit, at fifty-two and one-half minutes after nine A. M. of said day, placed plaintiff's writ of attachment in the hands of the sheriff, with direction to levy the same on the property of Frank & Son; whereupon the sheriff indorsed upon said writ: 'This writ came into my hands for service on the seventh day of November, 1881, at the hour of nine o'clock and fifty-two and one-half minutes A. M.

'A. D. LITTLETON, *Sheriff*.'

"That afterwards return was made on said writ by Ed. L. Smith, deputy sheriff, who was not present at or for more than one hour after its delivery to the sheriff, as follows: 'Received annexed writ of attachment November 7, 1881, at fifty-two and one-half minutes, nine o'clock A. M., and on same day at same time I have levied upon and attached the following property'—describing the stock of merchandise."

Under the facts found, the court properly held that the assignee was entitled to the possession of the property. The assignment was duly executed and acknowledged, and the assignee consented to accept the trust before the attachment was

Palmer v. Palmer et al.

levied. The attorney of Frank and Son was directed to do whatever was necessary to perfect the assignment, and under this direction he filed it for record thirty seconds after the writ of attachment was placed in the hands of the sheriff. In the absence of testimony or finding to the contrary, it may be presumed that the attorney of Frank & Son received the deed with this direction more than thirty seconds before he deposited it in the recorder's office to be filed for record, and hence that he so received it before the attachment was levied. The delivery of the assignment to the attorney with this direction operated, in effect, as a delivery to the assignee.

The fact that the assignment was not filed for record until thirty seconds after the levy of the attachment, is not material. The assent of creditors to a general and unconditional assignment of the property of the debtor is presumed. Code, § 2116; *Price v. Parker*, 11 Iowa, 144.

After such assignment, made in good faith, one creditor cannot obtain precedence by the levy of an attachment. The provision as to recording the assignment is intended for the protection of subsequent purchasers. See *Hall et al. v. Wheeler*, 13 Ind., 371; *Fiske v. Carr*, 20 Me., 301.

AFFIRMED.

PALMER V. PALMER ET AL.

1. **Conveyance: FRAUD TO IMPEACH: EVIDENCE.** A conveyance of land, executed and acknowledged in due form, will not be set aside for fraud, without a decided preponderance of the evidence establishing the fraud; and the alleged fraud in this case is not so established.
2. **Evidence: OF PERSONAL TRANSACTION WITH A DECEDENT AS AGAINST HIS ASSIGNEE.** A widow, in an action to set aside a deed made by her husband to the defendant, may not testify to a personal communication between herself and her husband affecting the merits of the action. Code, § 3639.

62	204
102	153
62	204
96	413
62	204
109	218
62	204
111	210
62	204
119	294

3. **Conveyance: DELIVERY OF DEED: WHAT CONSTITUTES.** Where a deed from a father to a minor child is absolute in form and beneficial in effect, and the father voluntarily causes the same to be recorded, this is in law a sufficient delivery to the child, and will carry with it the title to the land. In such a case, manual delivery and acceptance are not necessary. *Cecil v. Beaver*, 28 Iowa, 246, followed.

Appeal from Harrison District Court.

THURSDAY, DECEMBER 6.

ACTION in equity to set aside a deed of one hundred and sixty acres of land. The plaintiff is the widow of one William Palmer, deceased. In April, 1881, she and her husband executed the deed in question to the defendant, Daniel Palmer, who was the son of William Palmer by a wife from whom he had been divorced. In February, 1882, William Palmer died. The plaintiff brings this action to set aside the deed, on the ground that she was induced to sign it by the fraud of her husband and the defendant, Daniel, and on the further ground that, while the deed was caused to be recorded by her husband, it was not in fact delivered to Daniel, and did not come into his possession until after her husband's death. A trial was had, and the court dismissed the plaintiff's petition. She appeals.

L. A. Bolter and *J. D. Hornby*, for appellant.

S. H. Cochran and *G. T. Kelley*, for appellees.

ADAMS, J.—I. The conveyance to Daniel was without consideration. The deceased had several children besides him, and they and the plaintiff appear to have been left substantially unprovided for. No satisfactory reason for the conveyance is proved or suggested. We should not be indisposed to set aside the conveyance as to a portion of the land, if we could see our way clear to do so within the rules of law by which we are bound.

In the outset, we have to say that we do not see that

Daniel said or did anything to induce the conveyance. If any fraud was practiced upon the plaintiff, it must have been by her husband, her co-grantor. Whether his fraud alone would be sufficient to entitle the plaintiff to relief, we have not determined, because the fact of his fraud does not appear to be established by such preponderance of evidence as is necessary to justify a court in finding fraud.

The plaintiff testified, under the defendant's objection, that her husband told her at the time the deed was executed that it embraced but one forty. If he so told her, it was a personal communication, and she, a party to the suit, testified to it as against his assignee. We have to say that we think that the testimony was not admissible. Code, § 3639. And whatever competent evidence there was we think was outweighed by the evidence for the defendant. The deed itself is in evidence. It expressly describes the land as being one hundred and sixty acres. It could have described it without expressly specifying the number of acres. It seems incredible that the plaintiff's husband should have presented such a deed to her for her signature, with the patent lie upon his lips that it contained only forty acres. It may be that she could not read, but she does not so testify. We suspect that she could read. Her counsel asked the ingenious question: "Can you read that deed, *so as to tell where the land is?*" and she answered that she could not. The true point of inquiry as to whether she could read the words "one hundred and sixty acres," was evaded. Again, she had had trouble with her husband. She proved that fact for the purpose of showing that he was in a state of mind to defraud her. But if he was in such state of mind, she knew it. The confidential relations usually existing between husband and wife had been broken. This renders it still more incredible that he should have attempted such a shallow fraud. On the other hand, there is strong evidence tending to show that she spoke freely of the convey-

1. CONVEY-
ANCE: fraud
to impeach:
evidence.

2. EVIDENCE:
of personal
transaction
with a dece-
dent as
against his
assignee.

ance after it was made, and without claiming that she had been defrauded. Four witnesses testify to this. One Peterson testified that he conversed with her about the farm; that she spoke of having conveyed it to Daniel, and asked the witness if he supposed that Daniel would convey a forty of it to his own mother, saying that she would not have signed the deed if she had supposed that he would. In view of the presumption existing in favor of as solemn an instrument as a deed, executed and acknowledged in due form, and of the presumption against fraud, we have to say that we do not think that the plaintiff's case is made out upon the ground of fraud.

II. We come to inquire as to whether the deed was delivered. It does not appear to have actually come into Daniel's possession until after his father's death. It was, however, filed by his father for record, and was recorded, and taken by Daniel from the recorder's office. At the time of the conveyance, Daniel was a minor. In *Cecil v. Beaver*, 28 Iowa, 246, Dillon, Ch. J., said: "Where the deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes the same to be recorded, this is in law a sufficient delivery to the infant, and the title to the lands conveyed will pass thereby. In such a case, actual manual delivery and a formal acceptance are not necessary." Under the rule thus laid down, it appears to us that we must hold that the deed in question was delivered.

3. CONVEY-
ANCE: deliv-
ery of deed:
what consti-
tutes.

AFFIRMED.

KEEGAN V. ESTATE OF MALONE.

1. **Domestic Relations: SERVICES BY MEMBER OF FAMILY: PRESUMED TO BE GRATUITOUS.** Where it is shown that a person rendering services was a member of the family of the person served, and receiving support therein, either as a child, a relative or a visitor, a presumption of law arises that the services were gratuitous, and a recovery for such services cannot be had without showing an express promise to pay for them, or such facts and circumstances as will warrant the jury in finding that they were rendered in the expectation by one of receiving, and by the other of making, compensation therefor.
2. **Practice in Supreme Court: PAPERS FILED TOO LATE: COSTS.** Where an amended abstract and argument were filed after the time agreed upon by the parties, the court overruled a motion to strike them from the files, but taxed the costs of printing them to the delinquent party.

Appeal from Allamakee Circuit Court.

THURSDAY, DECEMBER 6.

THE plaintiff claims of the estate of Henry Malone, deceased, \$1,000 for boarding deceased from December, 1870, to December, 1880, \$1,200 for work on his farm, and \$190 for money advanced to him. The cause was referred, and, upon the referee's report, judgment was rendered in favor of the administrator for costs. The plaintiff appeals.

Brown & Portman, for appellant.

Boomer & Stillwell, for appellee.

DAY, CH. J. This action is at law, and the report of the referee, upon approval by the court, stands as the verdict of a jury, and will not be disturbed unless clearly unsupported by the evidence. The facts found by the referee, and fairly supported by the evidence, are as follows:

"1. That in 1855, and for some time previous thereto, H. Malone resided in Allamakee county, Iowa, with his brother,

Keegan v. Estate of Malone.

E. Malone, owning adjoining farms and working them in common, and living together in a home on the land of H. Malone.

"2. That H. Malone, deceased, E. Malone, Alice Keegan, Mrs. Duffy and Mrs. Ryan were brothers and sisters.

"3. That in 1855, Mrs. Keegan came from New York to live with H. and E. Malone, at their invitation, bringing with her her household furniture and effects, and bringing her son Henry, aged three and one-half years, and lived with H. and E. Malone for some three years, she doing the housework for them, and also out door work; at the expiration of which time H. and E. Malone separated, to live apart, and at the same time gave to Mrs. Keegan \$75 to return to New York.

"4. That Mrs. Keegan and her son started with H. Malone on her return to New York, but after going a short distance turned back, and she and her son continued to live with Henry Malone on his place until 1869, during which time she did the housework, and also a good deal of out door farm work of all kinds, for H. Malone, while the boy performed for Malone such work as farmers' boys usually do.

"5. That about 1869, Henry Malone bought and gave to Henry Keegan, either in payment for work performed or as gift, forty acres of land, the legal title being vested in Mrs. Keegan, and at different times subsequent to 1869 gave Henry Keegan personal property, consisting of horses, wagon, sled, two cows and two heifers.

"6. In 1869, Henry Keegan and his mother left Malone and moved on to the forty acres owned by Henry Keegan,—*Henry Keegan working the farm* and having the proceeds thereof, and his mother keeping house for him.

"7. That H. Malone lived apart from Mrs. Keegan and her son for about a year after they moved on to Henry Keegan's place, a part of the time living on his own place, and a part of the time boarding with Mrs. Duffy.

"8. Sometime in 1870, H. Malone went to live with Henry Keegan and his mother, and continued to live there up to the time of his death.

"9. That Henry Keegan was in poor health from the time he moved on to his own farm up to his death, a large portion of the time being unable to do any work, and being at great expense for medical attendance and medicine, and at no time able to perform a man's work at farming, but could do only light work on the farm and around the house.

"10. That Henry Keegan died in 1879, leaving his mother as his only heir.

"11. Henry Malone died in December, 1880, leaving Mrs. Keegan, Mrs. Duffy, Mrs. Ryan, and E. Malone, his only heirs.

"12. That Mrs. Keegan never claimed any ownership or control over the forty acres, or of the produce grown thereon, or of the stock, until after the death of her son, when she claimed the same as heir at law.

"13. H. Malone's farm of one hundred and sixty acres adjoined Henry Keegan's farm, and lay in common with it, there being no division fence.

"14. That Henry Malone and Henry Keegan worked their farms together, Henry Malone working on H. Keegan's farm with him and his mother, and he and his mother working on H. Malone's.

"15. That the crops grown on seven or eight acres of the Keegan farm, situated on the hill, were cut, stacked, threshed and kept with the crops grown on Malone's farm, there being no division made of the same. But the crops grown on the bottom-land on the forty were kept separate from Malone's.

"16. The stock owned by H. Keegan and Malone all ran together, and was all fed together in common, from the produce grown on both farms.

"17. The produce raised on both farms was used for the common support of the family, Malone contributing flour, meat, groceries, etc., to the support of the family.

"18. There was never any accounting, reckoning, or settlement made between the parties.

"19. The evidence does not show an express contract between Mrs. Keegan and deceased, that Mrs. Keegan should

receive pay for work and services performed, or board furnished, or any promise on the part of deceased to pay for such services and board, or any expectation on the part of claimant that she was to receive pay therefor.

"20. The evidence does show that Mrs. Keegan, Henry Malone and Henry Keegan lived together as members of one family until the death of Henry Keegan, and after his death Mrs. Keegan and H. Malone continued to live together till his death."

Appellant concedes that the claim for services prior to 1869 is probably barred by the statute of limitations, and does not urge that portion of the claim, but insists that plaintiff is entitled to recover for the board. Under the doctrine of *Scully v. Scully*, 28 Iowa, 548, the plaintiff is not entitled to recover. In that case it is said: "Where it is shown that the person rendering the services is a member of the family of the person served, and receiving support therein, either as a child, a relative, or a visitor, a presumption of law arises that such services were gratuitous, and in such case, before the person rendering the service can recover, the express promises of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation, by one of receiving, and by the other of making, compensation therefor." See *Hall v. Finch*, 29 Wis., 278; *Mountain v. Fisher*, 22 Wis., 93; *Lynn v. Lynn*, 29 Pa. St., 369; *Defiance v. Austin*, 9 Pa. St., 309; *Fitch v. Peckham*, 16 Vt., 150.

II. The appellant submitted with the case a motion to strike from the files appellee's amended abstract and argument, because not filed within the time agreed upon between the parties. The motion is overruled, but no costs will be taxed to the appellant for printing appellee's abstract and argument.

AFFIRMED.

1. DOMESTIC
relations: ser-
vices by mem-
ber of family:
presumed to
be gratuitous.

2. PRACTICE
in supreme
court: papers
filed too late:
costs.

EWALDT V. FARLOW.

1. **Evidence:** PAROL TO EXPLAIN OR VARY WRITING. Where plaintiff had made to defendant a bill of sale of certain goods, the testimony of plaintiff, that defendant agreed to apply the proceeds of the goods to pay plaintiff's debts, was not incompetent as contradicting, altering or explaining the bill of sale.
2. ———: **BREACH OF CONTRACT: IRRELEVANT MATTER.** Where plaintiff sought to recover damages for the violation of defendant's contract, under which land had been deeded to plaintiff's wife, evidence that the land had been incumbered since the conveyance was wholly immaterial to the issues.
3. **Practice in Supreme Court:** RULINGS NOT EXCEPTED TO IN TIME NOT REVIEWED. Rulings upon instructions which are not excepted to within the time prescribed by statute will not be reviewed.
4. **Motion for New Trial:** TIME OF FILING. A motion for a new trial must be filed at the same term and within three days after the verdict. Code, § 2838. And the fact that the court is not in session for a few days after the verdict, in the midst of the term, will not prolong the time for filing such motion.

Appeal from Montgomery Circuit Court.

THURSDAY, DECEMBER 6.

ACTION AT LAW. There was a judgment upon a verdict for plaintiff. Defendant appeals. The facts of the case appear in the opinion.

F. M. Davis and *F. P. Greenlee*, for appellant.

McPherson & Murphy and *Junkin & Deemer*, for appellee.

BROCK, J.—I. The petition is in three counts. The first seeks to recover for the wrongful conversion of a stock of goods, and notes and accounts. The second count alleges that plaintiff executed a bill of sale upon certain merchandise and notes and accounts, upon an agreement that defendant

and plaintiff should hold possession of the same together, and the proceeds thereof should be applied to the payment of plaintiff's debts; that defendant should advance money to pay off said debts, the bill of sale being security to him for such advances, and that defendant took exclusive possession of the goods, and has converted them to his own use, and refuses to account therefor. The third count alleges that the agreement under which the bill of sale was made was abandoned, and another entered into orally, which bound defendant to sell the stock of goods to one Warfield at the invoice cost price, and to receive in part payment one hundred and sixty acres of land at \$25 per acre, the balance in cash, the consideration of the sale to be received by plaintiff, who thereupon should reconvey or cause to be reconveyed to defendant eighty acres of land conveyed to plaintiff's wife under the first contract. It is alleged that defendant failed and refused to perform this contract, and plaintiff seeks to recover the damages he has sustained thereby.

The defendant denies the allegations of the petition, and avers that the goods were transferred to him under an absolute sale by plaintiff, which was witnessed by the bill of sale referred to in the petition. Defendant also sets up a counterclaim based upon a promissory note and an account.

II. The plaintiff testified to the contract, as set up in the second count of the petition, and that it was agreed that the parties should jointly hold the goods, which they were to sell, and apply the proceeds thereof to the payment of plaintiff's debts, etc. The defendant moved to strike out this evidence on the ground that the bill of sale must be regarded as embodying the contract of the parties, and it cannot be contradicted, altered or explained. The evidence has no such effect. It simply shows how the proceeds of the property were to be applied. It was surely competent for the parties to contract in regard to conditions upon which defendant should hold the goods. He acquired an absolute title by the bill of sale. But he could

1. EVIDENCE:
parol to ex-
plain or vary
writing.

bind himself to use the goods, or appropriate the proceeds, for the benefit of plaintiff. The evidence was not incompetent.

III. The defendant proposed to prove that the land deeded by defendant to plaintiff's wife had been attached in actions against plaintiff. The evidence was rightly excluded. Plaintiff seeks to recover damages resulting from the violation of defendant's contract. The present condition of the title to the land cuts no figure in the case. If it be incumbered by attachments, that fact would not relieve defendant of liability.

IV. The defendant complains of the ruling of the circuit court in giving and refusing instructions. But the abstract fails to show that exceptions were taken at the proper time. The abstract shows that defendant excepted to the refusal to give the instructions asked by defendant, but fails to show that the exception was taken when the ruling was made. Defendant relies upon exceptions to instructions given, included in his motion for a new trial. But, as we shall soon see, this motion was not made within the time prescribed by Code, § 2838. We cannot, therefore, review the rulings upon instructions.

V. The motion for a new trial was not made within the time prescribed by Code, § 2838. The verdict was rendered on Saturday, the 24th day of June. On that day the court adjourned until the fifth day of July. On Tuesday, the 27th, a general election was held. The section of the Code just cited provides that a motion for new trial shall be made at the "term, and within three days after the verdict."

If the court, after the adjournment and before the fifth of July, was in term, the motion was not in time, for more than three days intervened, excluding the Sunday and election day, which defendant thinks ought not to be counted—a question we do not determine. If the court was not in term during the recess, then the motion was too late, for it must be made at the term of the decision.

2. ——— :
breach of contract : irrelevant matter.

3. PRACTICE
in supreme
court : rulings
not excepted
to in time not
reviewed.

4. MOTION for
new trial :
time of filing.

Defendant's counsel insist that the law does not require the motion to be made on a day of the term when the court is not in session. The section cited will bear no such construction. It requires the motion to be made "at the term and within three days of the verdict." It often becomes necessary for a court, during a term, to adjourn for one or more days, in order to enable counsel to prepare their cases. It would not do to hold that during such adjournment counsel were not required to prepare motions for new trials. The object of the statute cited is to expedite such business, so that the motions may be decided before the end of the term. An adjournment for a day or more, if counsel's view be correct, would delay proceedings.

The motion for a new trial, not having been made in time, was correctly overruled. We can consider no questions raised in it.

Plaintiff files an amended abstract, which is denied by defendant, thus putting in issue the correctness of the original abstract. We find it unnecessary to determine the issues thus raised, as, upon the abstract filed by defendant, the judgment of the circuit court cannot be disturbed.

AFFIRMED.

SWEET V. WRIGHT ET AL.

62	215
139	752

- 1. Venue: CHANGE OF AS TO PART ONLY OF DEFENDANTS.** In an action against the principals and sureties in a bond, where there was but one defense, and all the defendants applied for a change of the place of trial on the ground of the prejudice of the judge against the *principals* only, it was error to grant a change to the principals only, and to retain the case and proceed to trial as to the sureties. The whole cause should have been removed and disposed of together.
- 2. Evidence: GOOD FAITH: OPINION OF ATTORNEY.** The testimony of an attorney who drew a bill of sale, to the effect that he regarded the transaction as an honest one, was not admissible on the question of the *bona fides* of the conveyance—that being the ultimate question for the jury.

Appeal from Marshall Circuit Court.

THURSDAY, DECEMBER 6.

ACTION upon a statutory indemnifying bond. The defendants, Wright & Spencer, obtained a judgment against one J. B. Sweet, Jr., and caused an execution to be levied upon certain goods, giving the sheriff an indemnifying bond under the statute. The plaintiff, claiming to be the owner of the goods, brings this action against Wright & Spencer as principals upon the bond, and against the defendants, George Glick and T. J. Fletcher, as sureties.

As to Wright & Spencer, the place of trial was changed to the district court. As to the sureties, the case was retained in the circuit court; and a trial there resulted in a verdict and judgment against them. They appeal.

Sutton & Childs, for appellants.

Brown & Carney and *T. Binford*, for appellee.

ADAMS, J.—I. The defendant sureties assign as error that the court erred in not granting a change of place of trial as to them. Section 2594 of the Code provides that, “as to those who take no change, the cause shall proceed as if none had been taken.” The plaintiff cites this section as decisive of the question before us.

Under this section it must be held that it does not follow, from the mere fact that a change is granted to a portion of the defendants or plaintiffs, that a change must also be granted to the others who do not desire it, but that the cause must proceed as to them as if no change had been taken. If, in the case at bar, the defendant sureties had not applied for a change, the court would have been justified in assuming that they did not desire it, and would have been justified in retaining the case as to them, and probably, also, in proceeding to trial without waiting for a trial against the principals. But

the defendant sureties did apply for a change. The motion purports to be made by all the defendants.

It is true, it was made solely on the ground of the prejudice of the judge against the principals, Wright & Spencer. But that, we think, is not material.

Whether, if Wright & Spencer had not joined in the motion, the court would have been justified in granting a change as to the sureties, no prejudice against them being shown, we do not determine. Such question is not before us. But, a change having been granted to the principals, and the defense, as it appears, made by the sureties, being identical with that of the principals, it appears to us that it was the sureties' right to have a change as to them also, and have one trial as to all. A case, we think, should be kept together, and disposed of by one trial, unless some reason is shown to the contrary. The time and expense of courts, as well as of litigants, demand this. The only provision for trying the same issue in two courts seems to be that contained in the section above cited, and that, as we have seen, is not applicable to this case. We think that the change granted as to the principals should have been granted as to the sureties.

II. The goods in question were formerly owned by the execution defendant, J. B. Sweet, Jr. He had, prior to the levy, made a bill of sale of them to his father, the plaintiff, and the issue tried was as to whether the sale was fraudulent. One Pillsbury, an attorney, who was employed to draw the bill of sale, was examined as a witness, and allowed to testify, against the objection of the defendants, that he regarded the transaction as an honest one. As to whether it was honest was the ultimate question for the jury; and evidence as to Pillsbury's opinion about it was not, we think, admissible.

Several other questions are presented, but they will not, we think, arise upon another trial. For the errors pointed out the judgment must be

REVERSED.

The Town of Storm Lake v. The Iowa Falls & Sioux City Railway Co. et al.

THE TOWN OF STORM LAKE V. THE IOWA FALLS & SIOUX CITY
RAILWAY CO. ET AL.

1. **New Trial: PROCEEDINGS TO OBTAIN: IRREGULARITY WAIVED.** One who seeks, under section 3154 of the Code, to vacate a judgment after the term at which it was rendered, and to obtain a new trial on the ground of fraud, or of unavoidable casualty, should file his verified petition, setting forth the facts on which he relies; but where, as in this case, he simply filed a motion, accompanied by affidavits setting forth the facts, and upon these papers a hearing was had without objection by the adverse party in the court below, *held* that objection to the irregularity of the proceedings could not for the first time be urged in this court.
2. **Right of Way for Street: PARTY DEFENDANT.** A corporation which holds a lease, perpetual at its option, of certain ground, has a right to be heard in a proceeding to establish a city street over the ground.
3. **Vacating Joint Judgment: PRACTICE.** Where a judgment was rendered in favor of two defendants jointly, and upon the application of one of the defendants it appeared that it ought to be set aside for fraud or unavoidable casualty, *held* that it should be set aside as to both defendants, and not only as to the one making the application.

Appeal from Buena Vista Circuit Court.

FRIDAY, DECEMBER 7.

ACTION under section 476 of the Code, to determine the compensation that should be awarded the defendants for right of way for a street across their depot grounds. The defendant, the I. F. & S. C. R. R. Co., filed an answer claiming six hundred dollars. The defendant, the Ill. Cen. R. R. Co., filed no answer, and was defaulted. Upon trial to a jury, verdict and judgment were rendered in favor of the defendants for \$175. Afterwards, upon application of the Ill. Cen. R. R. Co., the judgment was set aside and a new trial granted as to both defendants. The plaintiff appeals.

F. B. Gregory and *Wm. Milchrist*, for appellant.

J. F. Duncombe and *Joy & Wright*, for appellees.

ADAMS, J.—I. The application to set aside the judgment

was not made at the term at which it was rendered. Section 3154 of the Code, however, provides that a judgment may be set aside after the term for certain causes, among which are enumerated fraud practiced by the successful party in obtaining the judgment, and unavoidable casualty or misfortune preventing the unsuccessful party from prosecuting or defending. The ground alleged for setting aside the judgment in this case is that negotiations for a settlement were pending, and an agreement had been made between the plaintiff and Mr. J. F. Duncombe, as counsel for the defendants, that the plaintiff would not proceed to the trial of the case until it had notified him of its intention to do so; that the plaintiff proceeded to trial in violation of its agreement; that Mr. Duncombe was not notified, nor in court, but was engaged in the trial of an important case in another county, and the Ill. Cen. R. R. Co. was wholly unrepresented. If these were the facts, we think that we should be justified in holding that the case, if not one of fraud on the part of the plaintiff, was at least one of unavoidable casualty or misfortune, preventing the Ill. Cen. R. R. Co. from defending. But it is insisted by the plaintiff that, even if this is so, the company cannot be allowed a new trial, because it has not adopted the correct procedure.

To avail itself of such ground after the term was passed, it should have filed a petition, verified by affidavit, setting forth the judgment and the ground for vacating it. What the company filed is not called a petition, but a motion. But this was accompanied by affidavits setting out the facts relied upon, which affidavits are referred to in the motion, and, we infer, were attached to it. There was also attached to the motion, and referred to in it, what is called an answer, which is verified by affidavit, setting out the company's interest in the depot grounds, and the damages which it will sustain, and praying for an injunction to prevent the plaintiff from taking possession until final determination of the case.

Upon these papers a hearing was had, and the objection

The Town of Storm Lake v. The Iowa Falls & Sioux City Railway Co. et al.

now raised in respect to the want of a petition does not appear to have been raised upon the hearing. Under the circumstances, we think that we may treat the papers as a petition. We are unable to see that the plaintiff has been prejudiced by the irregularity. If timely objection had been made, the irregularity might, and would doubtless, have been corrected. If we should sustain the objection now, we should do so, it seems to us, at the expense of substantial justice.

II. It is insisted, however, that, taking the application to be sufficient in form, it is not supported by the evidence when taken as a whole.

On this point we have to say that, while there is considerable conflict, we think the alleged agreement, that the case should not be called for trial until Mr. Duncombe should be notified, is established. Mr. Duncombe's affidavit is very clear and positive, and he is corroborated, to some extent at least, by some of the plaintiff's trustees.

III. The plaintiff insists that it does not appear that the Ill. Cen. R. R. Co. has any such interest in the grounds in question as to entitle it to be heard. But we think otherwise. The company showed that it was a lessee of the road by a lease that was to be perpetual, unless it should elect to terminate the same and give notice thereof to the lessor, the I. F. & S. C. R. R. Co., its co-defendant.

IV. The court set aside the judgment as to both companies. The plaintiff insists that at most the judgment should have been set aside only as to the Ill. Cen. R. R. Co. But the damages assessed were assessed only as belonging to both defendants. The proceedings contemplated but one judgment. We think it would have been an irregularity, and that the plaintiff might well have complained, if the judgment rendered in favor of both defendants as covering all the damages had been allowed to stand, while another judgment should be rendered in favor of the Ill. Cen. R. R. Company. We see no error.

AFFIRMED.

2. RIGHT of
way for
street: party
defendant.

3. VACATING
joint judg-
ment: prac-
tice.

GOODNOW V. STRYKER.

1. **Taxes upon Another's Land: PAYMENT UNDER BELIEF OF OWNERSHIP: RECOVERY FROM OWNER.** Where one in good faith, believing himself to be the owner of land, pays the taxes upon it, and afterwards the land is adjudicated to belong to another, the law raises an implied promise on the part of that other to reimburse the one who has paid the taxes for his benefit, and on such implied promise an action will lie. *Goodnow v. Moulton*, 51 Iowa, 555, followed.

2. **Former Adjudication: UPON WHOM AND HOW FAR BINDING.** An adjudication binds only the parties thereto, and binds them only as to the points adjudicated in which they are interested; and when one is made a party to a cause for one purpose only, he is not bound by the adjudication of a question involved in the cause as between other parties thereto, and in which he has no interest.

3. **Statute of Limitations: STATUTES CONSTRUED.** Section 2746 of the Revision provided that "when a cause of action has been fully barred by the laws of the country where the defendant has resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter;" but, by chapter 167 of the laws of 1870, said section was made inapplicable where the cause of action arose in this state. *Held* that section 2746 could not avail as a defense against a cause of action arising in this state, unless the action was fully barred at the time of the taking effect of chapter 167, Laws of 1870.

4. —: **WHEN IT BEGINS TO RUN: ACTION ON PROMISE BASED ON CONTINGENCY.** As against an action brought upon an implied promise which is based upon a contingency, in such a manner that it is not enforceable until the happening of the contingency, *held* that the statute of limitations does not begin to run until the contingency is past, and the promise has become absolute.

The foregoing points affirmed on rehearing.

5. **Former Adjudication: APPEARANCE OF COUNSEL IN ARGUMENT.** The fact that a party interested in a like question secures a hearing of his counsel upon the argument of a cause, does not make him a party to the cause so as to make the adjudication thereof binding upon him.

Appeal from Webster Circuit Court.

FRIDAY, DECEMBER 7.

THIS action was brought by the plaintiff, as assignee of the Dubuque & Sioux City Railroad Company, to recover for

68	221
78	129
62	221
102	134
62	221
130	323
62	221
144	462

taxes paid by that company on certain land in Webster county, belonging to defendant, Stryker. The Dubuque & Sioux City Railroad Co. claimed to be the owner of the land at the time the taxes were levied, and which land it conveyed by a deed of warranty.

The circumstances under which the taxes were paid were for the most part substantially the same as those under which the taxes were paid in *Goodnow v. Moulton*, 51 Iowa, 555. The several matters of defense will be set out in the opinion. The court dismissed the plaintiff's petition, and he appeals.

George Crane, for appellant.

Theodore Hawley and *C. H. Gatch*, for appellee.

ADAMS, J.—I. In *Goodnow v. Moulton*, the taxes were paid by the Iowa Homestead Co., and at a time when that company claimed to be the owner of the land, and it was found that the claim was made in good faith, though its validity was disputed by the defendant. Mr. Justice Seevers, in his opinion in that case, said: "When the taxes were paid, it was believed by said company that it was the owner of the lands, under the act of congress known as the railroad grant."

The defendant contends that the case at bar differs from that case, because the certification of the lands under which the plaintiff claims was suspended until April, 1863, and, the taxes paid being for the years 1861, 1862 and 1863, the plaintiff should not be heard to say that his assignor paid the taxes in good faith. The taxes, however, it appears, were not paid until after April, 1863. Possibly the defendant had in mind that the assessment of the taxes for 1861 and 1862, being made within the time the certification was suspended, were invalid, but he does not raise such point in his argument, and we do not, therefore, consider it. So far, then, as the circumstances are concerned under which the taxes were paid, we have to say that we see nothing in them to distinguish

1. TAXES upon another's land: payment under belief of ownership: recovery from owner.

the case from *Goodnow v. Moulton*; and it follows that we are justified in holding that there was an implied promise on the part of the defendant to reimburse the plaintiff's assignor.

II. The defendant alleges that the plaintiff is barred by a prior adjudication in an action in which the Iowa Homestead Co. was plaintiff, and the Des Moines Navigation & R. R. Co., and the present defendant, Stryker, and others, were defendants, the decision in which case is reported in 17 Wallace, 153. It appears that the lands on which the taxes were paid were a part of the lands in controversy in that case, having been conveyed before the commencement of the action by the plaintiff's assignor, by deed of warranty, to the Iowa Homestead Co., the plaintiff in that action. It appears, also, that the Iowa Homestead Co., having paid certain taxes on the same land, prayed that the defendant, Stryker, be decreed to reimburse it for such payments, if it should be decreed that he was the owner of the land. The defendant, Stryker, was decreed to be the owner of the lands, but no recovery was allowed against him for the taxes paid. Now, while the taxes sought to be recovered in the case at bar were no part of the taxes sought to be recovered in that case, and neither the plaintiff nor his assignor was a party to that action, yet it is said that the adjudication is sufficient to bar a recovery in this case.

It is, perhaps, not to be denied that, if the court correctly held in that case that the Iowa Homestead Co. was not entitled to recover for taxes paid, it would follow as a matter of law that the plaintiff in this case is not entitled to recover; but, since the decision in *Goodnow v. Moulton*, we cannot follow the decision in *Iowa Homestead Co. v. Des Moines Navigation & R. R. Co. et al.* as authority, nor, so far as the point is concerned which we are now considering, is it claimed that we should. The claim is that the taxes in question were actually covered by the adjudication in that case.

In our opinion, this claim cannot be sustained. The taxes in question were not only no part of the taxes sought to be

recovered in that action, but they were not paid by the plaintiff in that action as in *Goodnow v. Litchfield*, 59 Iowa, 226. They were paid by the Dubuque & Sioux City R. R. Co., and neither it nor its assignee, the present plaintiff, was a party to that action. The defendant contends that the Dubuque & Sioux City R. R. Co. was substantially a party to that action, because the plaintiff in the action claimed a part of the lands by deed of warranty from the Dubuque & Sioux City R. R. Co., and notified that company of the pendency of the action.

The effect, however, of such notification would be only to bind the Dubuque & Sioux City R. R. Co. by the adjudication in respect to title. In that case the Dubuque & Sioux City R. R. Co. was interested by reason of its deed of warranty, but it had no interest in the taxes sought to be recovered. So far as the issue was concerned involving a right of recovery for the taxes, it was in no possible sense a party. The adjudication in that case, then, does not operate as a bar in this.

III. The defendant pleads the statute of limitations. He avers that he is a resident of the state of New York, and that in that state action upon contract not expressed in writing is barred in six years. He relies, as we understand, upon section 2746 of the Revision, which provides that, "when a cause of action has been fully barred by the laws of the country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter."

But in this case the cause of action arose in this state; and in 1870 the statute cited was amended so as to make it inapplicable where the cause of action arose in this state. Chap. 167 of the Laws of 1870. Unless, then, the action became barred before the amendment, it did not become barred under the statute relied upon. The payments appear to have been made December 9, 1863, January 20, 1864, and October 31, 1866, respectively. But we do not think that a cause of action accrued upon each payment at the time it was made, nor upon all at the time the last one was made. The implied

3. STATUTE of
limitations:
statutes con-
strued.

Goodnow v. Stryker.

promise upon which the action is based arose by reason of the circumstances. *Goodnow v. Moulton* above cited. One very important circumstance was that the title was involved in serious litigation, which was not terminated in the defendant's favor until 1873. We do not think that the defendant's implied promise could be regarded as absolute. He certainly never promised to pay these taxes in case the title should be adjudicated to be in the Iowa Homestead Co., and no one had any reason to suppose that he intended to incur any such liability. The most that can be said, then, in regard to the defendant's implied promise, is that it was based upon a contingency, and, being so, it was not enforcable until the contingent event had happened. We think that the cause of action did not arise until the termination of the litigation by which the title was adjudged to be in the defendant. If the Homestead Co. had before the final decision abandoned the litigation and conceded the title to be in the defendant, it may be that a cause of action would then have accrued. We do not say that a final decision was necessary. We merely say that we do not think that the defendant could be understood as promising that he would pay the taxes sooner than the title was assured to him, either by adjudication or concession.

Such being our view, it appears to us that the cause of action did not accrue until 1873, which was after the amendment; and, the defendant being a non-resident, the action is not barred. We think that the plaintiff is entitled to recover the amounts paid, with interest thereon from the time of payments respectively, and to have the same decreed a lien upon the land.

REVERSED.

ON REHEARING.

ROTHROCK, J.—I. This cause has again been presented to us upon a petition for rehearing, and has also been orally argued by counsel for both parties.

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It is claimed that, while as a matter of law the lands were subject to taxation for the years 1861 and 1862, yet they were not subject to taxation under the grant under which the railroad company was then claiming title to them, and it was, therefore, neither the right nor duty of the railroad company to pay taxes which were not and never could, as against it, have become valid. But in the cases of the *Homestead Company v. Webster County*, 21 Iowa, 221, and *Dubuque & Pacific R. R. Co. v. Webster Co.*, Id., 235, this court held that it was the duty of the R. R. Co. to pay these taxes. It cannot, therefore, be said that the taxes in question were paid voluntarily or officiously. It is abundantly evident all through the record in these tax cases that the railroad company and its assignees, at all times, down to the final adjudication against them in the supreme court of the United States, acted in the belief that the lands passed to them under the railroad grant. The fact that during the years 1861, 1862 and 1863 there were conflicting claims to the lands, and for a part of that time the lands were withheld from certification by reason thereof, and were not taxable, cannot, after the repeated decisions of this court that the lands were taxable for those years, control the rights of the parties to this litigation.

II. It is insisted that the statement in the foregoing opinion, that the taxes for which recovery is sought in the case at bar are no part of the taxes which were sought to be recovered in the case of *Homestead Co. v. The Valley R. R. Co.*, 17 Wall., 153, is erroneous.

Whether this be correct or not we think can make no difference upon the question of former adjudication, because, in our opinion, the Dubuque & Sioux City R. R. Co., the plaintiff's assignor, was in no sense a party to that action, so far as the question of taxes is involved. We are content with what is said in the foregoing opinion upon that subject.

III. Lastly, it is again urged that the claim for taxes was barred by the statute of limitations when the action was commenced. In the foregoing opinion it is held that the right

of action did not accrue until the termination of the litigation by which the title was adjudged to be in the defendant. It is claimed that this rule is erroneous, and that rights of action accrued upon the payments at the time they were made. We are not disposed to adopt the rule contended for. The case is a peculiar one. The controversy between the railroad grant and the river grant continued for many years. The lands were held by federal authority to belong, first to one grant, and then to the other, and then again to the other, and the title was not finally and conclusively settled until the decision in the case of *Homestead Co. v. Valley R. R. Co.*, 17 Wallace, 153. If the plaintiff or his assignor had commenced an action before that time to recover these taxes, it would have been a virtual abandonment of all claim of title to the land. The conflicting decisions as to the title warrant the belief that those parties claiming under the railroad grant asserted title to the land in good faith to the last. Under these circumstances, we feel warranted in adhering to the rule that the statute did not commence to run until the final adjudication in December, 1872.

It is claimed, however, that the question of title was finally decided in December, 1866, in the cases of *Wolcott v. Des Moines Co.*, and *Des Moines Co. v. Burr*, 5 Wallace, 681 and 689. We think it is sufficient in regard to this feature of the case to repeat what was said of the Wolcott case in *Goodnow v. Moulton*, 51 Iowa, 555: "This action (the Wolcott case) was between parties, both of whom claimed under the river grant, and it was held that the title to such lands had passed thereunder. But, as no one claiming under the railroad grant was a party to the action, it cannot be said that the decision was of any bearing as to them."

It is true that counsel of the Dubuque & S. C. R. R. Co. were allowed to appear and be heard in argument in the Wolcott and Burr cases in the Supreme Court of the United States; but the railroad company was not a party to the record. It is no unusual thing for counsel interested in a like question to be permitted

5. FORMER
adjudication:
appearance
of counsel in
argument.

Morris v. Steele.

to appear in the argument of a case; but that any right of his client is adjudicated in the case because of such appearance, cannot be admitted. The former opinion is adhered to and the judgment is reversed.

MORRIS V. STEELE.

1. **Practice in Supreme Court: EVIDENCE NOT PRESERVED STRICKEN OUT.** Where no bill of exceptions is found of record in the court below, and it is doubtful whether or not any such bill was ever filed there, a motion to strike the evidence from the abstract, on the ground that it was not preserved by a bill of exceptions, must be sustained.
2. ———: **LOST RECORDS.** Lost records in the court below cannot be supplied by affidavits in this court.
3. **Judgment of District Court: PRESUMPTION IN FAVOR OF.** Where an action was founded upon a guardian's bond, and also upon a promissory note, and a judgment was rendered against defendant in the cause, but it does not appear whether upon the bond or upon the note, and it might have been upon the note, this court will not reverse the judgment on the ground that the court below had no jurisdiction of the action upon the guardian's bond, because the guardian's accounts had not been settled in the circuit court.

Appeal from Johnson District Court.

FRIDAY, DECEMBER 7.

THIS is an action against the defendant on certain guardian's bonds, which it is alleged he signed as surety for Eleanor S. Wood, plaintiff's guardian, and also to recover upon a certain promissory note executed by the defendant to the plaintiff. There was a trial by the court, and a judgment was rendered for the plaintiff for \$300. Defendant appeals.

S. H. Fairall, for appellant.

A. C. Younkin and *Milton Remley*, for appellee.

ROTHROCK, J.—I. The plaintiff, upon the submission of the case and in the printed argument, presented a motion to strike out all of the evidence from appellant's abstract, upon the ground that the evidence was not preserved by a bill of exceptions. The defendant resisted this motion by the affidavit of his counsel and of the clerk of the district court. The clerk stated in his affidavit that the short hand reporter's notes, duly certified, were filed in his office, but were not entered upon the appearance docket. He makes no mention in his affidavit of the filing of a bill of exceptions. On the other hand, the deputy clerk of the district court made an affidavit, which was filed by the plaintiff, in which it is stated that no bill of exceptions had been filed in the clerk's office. The fact is that there is neither a bill of exceptions nor a reporter's transcript to be found in the clerk's office or elsewhere.

The affidavit of counsel for appellant sets forth that he prepared a bill of exceptions, and that at that time the judge who tried the case had become mentally and physically unable to sign the same, and that thereupon counsel for appellee agreed that the signature of the judge should be waived, and agreed that the bill of exceptions should be regarded as signed by the judge, and that the said bill of exceptions and written agreement were handed to the clerk to be filed.

We think the motion to strike out the evidence must be sustained. It is not in terms claimed in the abstract that it is an abstract of the evidence as shown by a bill of exceptions. If it had been so stated, it would have been the right of appellee to file an additional abstract denying that there was any bill of exceptions, and calling upon the appellant for a transcript. Of course, a transcript would not have shown that there was a bill of exceptions, because there is none on file, and there is nothing in the clerk's office to show that any ever was on file.

A motion to strike the evidence from the abstract, because not preserved by a bill of exceptions, properly raises the

1. PRACTICE
in supreme
court: evi-
dence not
preserved
stricken out.

question whether there was a bill of exceptions or not. This can be settled by the record of the court below, and by that only. Lost records in the court below cannot be supplied by affidavits in this court.

II. The motion being sustained, we have nothing left of the case excepting the pleadings. It appears from the pleadings that Eleanor S. Wood, the mother of the plaintiff, was the guardian of the plaintiff during her minority; that plaintiff was the owner of forty acres of land; and that her said guardian sold the land to the defendant under an order from the circuit court; that defendant became surety on the guardian's bond; that plaintiff's mother received \$150 of the purchase money, and the defendant executed his promissory note to the plaintiff for \$200, payable on a certain date corresponding with plaintiff's arrival at full age; that when the plaintiff was fifteen or sixteen years old an arrangement was made whereby defendant's note was surrendered to him, and the note of a third person was taken and collected by the guardian. When the note was surrendered, the plaintiff signed a receipt in full, and an agreement that she would never make any claim against defendant as surety for her guardian. After this, plaintiff's mother and guardian died, wholly insolvent, leaving no property whatever. The plaintiff sought to recover upon the guardian's bonds and upon the note which was executed to her. She claimed that the agreement was never knowingly signed by her; that she received no money for the note; and denied that any part of the proceeds was paid to her, or expended for her benefit.

The appellant claims in argument that the district court had no jurisdiction of the action, and that, before any suit can be maintained on the guardian's bond, the guardian's accounts should be settled in the circuit court, and the amount found to be due should be ascertained. If it were not for the cause of action founded upon the promissory note payable to the plaintiff, we might consider the question

Dows & Co. v. Morse & Lilly.

presented by counsel. But every reasonable presumption must be indulged in favor of the correctness of the judgment of the court below, and we cannot say without the evidence that the court was not warranted in finding the defendant liable in the sum of \$300 on the cause of action founded on the note.

AFFIRMED.

DOWS & CO. v. MORSE & LILLY.

1. **Contract: SIGNED BY ONE PARTY ONLY: EVIDENCE.** A contract which has been signed by one of the contracting parties only, but which has been recognized and acted upon by both, is binding upon both, and is admissible in evidence in an action between them.
2. **Replevin: OF CORN PURCHASED UNDER CONTRACT: EVIDENCE.** Where plaintiffs entered into a contract to furnish money to defendants wherewith the latter were to buy corn for plaintiffs, and it appeared that defendants, when they had bought a crib of corn, would mark the crib with plaintiffs' name and draw upon plaintiffs for the cost of the same, accompanying the draft with a receipt for the crib, *held* that the corn thus became the property of plaintiffs, as between them and the defendants, and, in an action between them to recover possession of the corn, it was immaterial that it was bought with defendants' and not with plaintiffs' money, and that defendants had given to others crib receipts for portions of the same corn, and that defendants removed the corn from the cribs for the purpose of shelling and shipping.
3. **Contract: AGENCY: TENANCY IN COMMON.** Under the contract involved in this case, (see opinion,) whereby defendants were to purchase corn with plaintiffs' money, *held* that defendants were the agents of plaintiffs, and not tenants in common with them of the corn.

Appeal from Adams Circuit Court.

FRIDAY, DECEMBER 7.

THIS is an action of replevin for a large quantity of corn in bins, in Corning and Preston, and in an elevator owned by the defendant, Lilly. The trial was to a jury, and resulted in a verdict and judgment for the plaintiffs. The defendants appeal.

62	231
85	117
62	231
126	638
62	231
1139	298

C. C. Wilson and Davis, Wells & Russell, for appellants.

Stewart Brothers and C. D. Kasson, for appellees.

DAY, CH. J.—I. The defendants executed an agreement as follows: "Memorandum of agreement between David Dows & Co. and Morse & Lilly, of Corning, Iowa. David Dows & Co. are to provide Morse & Lilly the money necessary from time to time to purchase such quantity of sound corn at Corning, Iowa, as David Dows & Co. deem advisable. Morse & Lilly agree to make such purchase for David Dows & Co., and to use the money thus provided for no other purpose than the purchase of sound ear corn as above stated, and the expenses necessarily connected therewith, and the corn so purchased shall be the property of David Dows & Co., and the cribs containing the same shall be marked with the name of David Dows & Co. It is further agreed between the above mentioned parties that Morse & Lilly, as compensation for their services in purchasing, handling, cribbing, shelling and shipping the above corn, shall receive whatever sum may remain when the corn is sold by David Dows & Co., after David Dows & Co. shall have received the money so invested, and interest thereon at the rate of ten per cent. per annum, also one cent per bushel, and all freight and other charges incurred by them. And Morse & Lilly further agree, in consideration of the premises, to guarantee David Dows & Co., against all loss on account of the purchase of the above mentioned corn, and to make good to them their investment, with interest, also one cent per bushel, and such charges and expenses as may be incurred by them. MORSE & LILLY."

The defendants also executed another contract exactly like the one above set out, with the exception that the name of "Prescott" is inserted instead of that of "Corning."

The plaintiffs offered these contracts in evidence. The de-

defendants objected upon the ground that they are not signed by David Dows & Co. The court overruled the objection. The defendants assign this action as error. The evidence shows that the plaintiffs accepted the contracts and advanced a large amount of money thereunder, and that, pursuant thereto the defendants purchased a large quantity of corn, and placed it in the bins in question, upon which the name of plaintiffs was marked. Under these circumstances the contract is binding upon both parties, although not signed by plaintiffs. *Wise v. Ray*, 3 G. Greene, 430; *Attix, Noyes & Co. v. Pelan*, 5 Iowa, 336. The court did not err in admitting the contracts in evidence.

II. The plaintiffs produced as a witness George A. Morse, one of the defendants, who testified in substance that the defendants bought the corn in controversy, under the contracts in question, for David Dows & Co., and that when a crib was full they made out a crib receipt and drew a draft on David Dows & Co., and deposited the draft and crib receipt with the banking house of Frank & Darrow, who placed the same to the credit of Morse & Lilly, and forwarded it for collection, and delivered the crib receipt to David Dows & Co. Upon cross-examination this witness stated: "We drew drafts, attached the same to crib receipts, and got the money through our bankers, and when the money was received it was used by us to purchase grain." The defendants' counsel then asked the following questions: "Did you use it to purchase this particular corn, or did you use it in your general fund?" The plaintiff objected to this question. The court sustained the objection, and remarked in the presence of the jury as follows: "I think the simple question raised by the issues, of the right of possession, is whether, in pursuance of this contract, the corn was set apart as coming within the contract by the parties, and placed subject to the conditions of the contract. I do not think it makes a particle of difference where the money came from. If, in pursuance of the contract, the parties turned it over under the

1. CONTRACT:
signed by one
party only:
evidence.

2. REPLEVIN:
of corn pur-
chased under
contract: evi-
dence.

contract and rendered it subject to it, and that was the intention of the parties, then it would become subject to the contract." Defendants' counsel then stated to the court: "We offer to prove by this witness, on cross-examination, that this corn was not bought with the money furnished by David Dows & Co., but that the money they obtained from David Dows & Co. was placed in their general bank account, with all their other funds, and used generally for any purpose. We offer to prove, further, that this identical corn that was replevined was taken in from farmers and stored, and was at the time corn that was stored for farmers, and that the farmers held crib receipts for same." The plaintiff objected to this evidence upon the ground, amongst others, that defendants are estopped by their crib receipts from claiming that this corn was purchased for David Dows & Co. The court sustained the objection, and remarked as follows: "I think it would not be proper. While, as between a farmer who is claiming under a crib receipt and David Dows & Co. who are claiming crib receipts, some question might arise, as to these parties, they would be held to just the corn that they turned over to the parties in this action, as coming within the purview and intent of the contract; that is to say, held to the conditions of the contract, whatever they are; and they could not go outside of their own acts in setting apart the corn and declaring it a part of the corn that was bought under the contract." The defendants excepted, and assign the rejection of this evidence as error. The action of the court was right. The evidence shows that the corn was placed in bins upon which the name of plaintiffs was marked, as required in the contracts. This constituted a designation and setting apart of the corn for the plaintiffs. Whatever might be the rights of third parties, the defendants could not defeat the rights of plaintiffs by showing a wrongful commingling of the plaintiffs' money with their own.

III. The witness, Morse, upon cross-examination, testified as follows: "We bought the corn mentioned in crib

receipts at Corning and Prescott. The receipts show when it was bought. On Monday after the fourteenth of October, some of the corn was hauled to the elevator from the cribs." The defendants then proposed to show by this witness that the firm did their shelling and shipping from the elevator. The plaintiffs objected. The court sustained the objection, and remarked that the only question the court would inquire into was the question of the right of possession. This action of the court was right. Even if the grain was removed to the elevator for a proper purpose, this fact would not militate against the plaintiffs' right of possession under the contract.

IV. The court instructed the jury as follows: "If the jury find from the evidence that the defendants, Morse & Lilly, purchased corn in controversy under and in pursuance of the contracts which have been introduced in evidence, and that they placed the corn in cribs, and marked said cribs in the name of David Dows & Co., and executed and delivered to David Dows & Co. the crib receipts which have been admitted in evidence, such acts would amount in law to a delivery of the corn to David Dows & Co., and defendants, Morse & Lilly, would have no right of possession in the said corn, except to handle the same in shelling and shipping such corn with the consent of David Dows & Co.; and if Morse & Lilly undertook to remove said corn from such cribs, without the consent of David Dows & Co., or any part of the same, or against their direction or protest, such taking or disposition of the corn would constitute a wrongful taking of the same." It is insisted that to make this instruction consistent with the other instructions the court should have added the following: "Unless appellant took the same for the purpose of shelling and shipping." But the court in this instruction is speaking of acts of the defendants done without the consent of the plaintiffs. Without the consent of the plaintiffs, the defendants would have no right to take the corn, even for the purpose of shelling and shipping.

V. The court further instructed the jury as follows: "Un-

 Scotten v. Fegan et al.

der the contract in question the defendants, Morse & Lilly, would be the agents of David Dows and & Co. in the purchasing, cribbing shelling and shipping of the corn purchased under the contract, and the authority that is conferred upon Morse & Lilly is only the authority to shell and ship the corn in the cribs as their principals, David Dows and Co., shall direct; and assertion of any right to said corn that would be counter to, or would defeat, the right of plaintiffs, David Dows & Co., would be a wrongful taking of the same." The defendants insist that in this instruction the court misconstrued the contract. They insist that under the contract the plaintiffs and defendants were tenants in common. No authority is cited in support of this position. We do not think it is correct. See *Reed v. Murphy*, 2 G. Greene, 574; *Price & Co. v. Alexander & Co.*, Id., 427; *Crooker Bros. & Lamereaux v. Brown*, 40 Iowa, 144. There was no error in the other rulings of the court.

AFFIRMED.

SCOTTEN V. FEGAN ET AL.

- 1. Notary Public: LIABILITY FOR FALSE CERTIFICATE OF ACKNOWLEDGMENT.** The liability of an officer for making a false certificate of acknowledgment is fixed by statute, and, to become liable therefor under the statute, he must make the false certificate, not only negligently, but "knowingly." Code, § 1964.

Appeal from Des Moines District Court.

FRIDAY, DECEMBER 7.

ACTION upon an official bond given by the defendant, Fegan, as notary public. The other defendants are sureties upon the bond. The petition shows that Fegan took the acknowledgment of a forged mortgage given to secure a note which was forged; that the note purported to be executed by

one Joseph Cresop; that the mortgage was executed by a man who claimed to be Joseph Cresop, the owner of the land, and by a woman who claimed to be his wife, but who were not the persons they claimed to be; that the plaintiff purchased the note and mortgage of one who was named therein as payee and who endorsed the note to the plaintiff without recourse. The liability of Fegan and his sureties is alleged to consist in the fact that he "wrongfully, falsely, negligently, and carelessly executed and issued his official certificate of acknowledgment," etc. The defendants demurred to the petition upon the ground that it does not state that Fegan knowingly misstated any material fact. The court sustained the demurrer, and the plaintiff electing to stand upon his petition, judgment was rendered for the defendants for costs. The plaintiff appeals.

Hall & Huston, for appellant.

Poor & Baldwin, for appellee.

ADAMS, J.—Although the plaintiff avers that Fegan *falsely* executed and issued his certificate, it is not claimed by him that his averment shows that Fegan acted in bad faith. We shall take the averment to mean, then, merely that Fegan made a false certificate as the result of negligence. So construing it, we have to say that in our opinion the petition is not sufficient.

The liability, as we view it, is a statutory one, and only such. We do not say that there would be no liability in the absence of a statute, but, there being a statute, the liability, we think, must be held to exist by reason of it, and not to be greater or less than the statute provides. In the statute we find it defined in these words: "Any officer who knowingly misstates a material fact in either of the certificates above contemplated shall be liable for all damages," etc. The petition, we think, cannot be held to be sufficient, unless an averment that one *negligently* misstated a material fact is

Sawyer v. Perry et al.

equivalent to an averment that he *knowingly* misstated a material fact; and no one would claim that it is.

What should be deemed *knowingly misstating a material fact* is a different question. Fegan's certificate states (as was necessary) that the persons executing the mortgage were personally known to him. Counsel upon each side have made a very able argument upon the question as to when a person can properly be said to be personally known to another. The question is not free from difficulty. Personal knowledge of this kind shades off into that which cannot properly be deemed such.

But the question before us is simply one of pleading. The plaintiff, we think, should by his averment have brought himself within the language of the statute. What evidence would support the averments would be a question to be determined upon the trial. We think that the demurrer was properly sustained.

. AFFIRMED.

SAWYER V. PERRY ET AL,

1. **Fraud: NOT DISREGARDED FOR SAKE OF PROTECTING HOMESTEAD.**

Where a wife was the owner of land, including the homestead, and entrusted her whole business to her husband, and the husband made arrangements to secure a loan from plaintiff's assignor, to be secured by mortgage on the wife's land, promising that he and his wife would execute a note for the loan and a mortgage on the land, including the homestead, to secure the note, and the papers were so executed by the husband and wife as to lead plaintiff's assignor to suppose that they were executed in accordance with the understanding, and were sent to plaintiff's assignor, who thereupon forwarded the amount of the loan to the husband, *held* that the wife could not be heard to assert that her husband had no authority to sign the note, and that neither could take advantage of erasures in the mortgage, so made as not to be easily noticeable, and the effect of which would be to release the homestead from the lien of the mortgage.

2. **Attorney's Fee: PROVISION IN NOTE AND MORTGAGE.** Where a note provided for an attorney's fee of twenty-five dollars, and the mortgage securing the note provided for a *reasonable* attorney's fee, in the absence of evidence as to what was a reasonable fee in the case, *held* that nothing more could be allowed than the twenty-five dollars provided in the note.

Appeal from Poweshiek District Court.

FRIDAY, DECEMBER 7.

ACTION in chancery to foreclose a mortgage. There was a decree of foreclosure as to part of the land described in the mortgage, and a judgment against the mortgagors for the amount of the debt. Plaintiff appeals. The facts of the case are stated in the opinion.

Clark & Cheshire, for appellant.

Haines & Lyman, for appellee.

BECK, J.—I. The mortgage in suit covers eighty acres of land, and was given to secure a promissory note executed by defendants, Mary A. Perry and her husband, G. S. Perry, made payable to E. N. Perry, E. T. Nutter and H. Nutter, and transferred to plaintiff. The payees of the note, and certain persons holding liens upon the land, are made defendants. Mary A. Perry and her husband alone defend the action. As defenses they allege that the title of the land is in the wife; that forty acres of the tract is their homestead; that the note was executed by the wife, and was afterward altered by the husband's signing it, and by the change of the word "I" to "we," so that it reads "we promise to pay," etc., instead of "I promise," etc., and that the husband did not join in the mortgage, which therefore fails to bind the homestead. The correctness of the appellant's abstract, so far as it presents the evidence, being disputed by the appellees, we have examined the original evidence on file in this court, upon which we find the following facts:

1. FRAUD: not disregarded for sake of protecting homestead.

G. S. Perry, being in want of money, visited the state of Maine, where the payees of the note resided, one of them being his brother, for the purpose of negotiating a loan. He proposed to the payees, in case they would loan him the money, to secure the payment by a mortgage upon the farm upon which he lived, near Grinnell, forty acres of which constituted the homestead of himself and wife. He advised the payees that the title of the land was in his wife, and promised, in case they would loan him the money, he and his wife would execute a mortgage upon the eighty acres constituting the farm upon which he lived, which should be a lien upon the homestead of himself and wife. He also promised that he and his wife would execute a promissory note for the money to be loaned. Upon their faith in these promises and representations, the payees agreed to loan the money to him. Thereupon he returned home, caused the note and mortgage to be executed and the mortgage to be duly acknowledged and recorded, and then sent both to the payees, and received in return the amount of the loan, \$3,500.

II. The wife now insists that the note is void by reason of alterations which were made by the husband's signing it, and by changing the word "I" to "we." There is not one word of evidence tending to prove the alleged alteration last named. The scrivener who drew the note declares that he "cannot tell whether the "we" was written before the "I," or the "I" before the "we." He does not pronounce it an alteration. An inspection of the note throws no light upon the question of this alteration. The defendants, therefore, fail to establish it.

III. The wife testifies that it was her purpose to execute a note and mortgage to the payees in order to enable her husband to borrow the money. But she has only a meager recollection of the circumstances. She does not appear to know whether, under the arrangement between her and her husband, he was to sign the note with her. She does not pretend to deny that he was to sign it. She declares that her husband managed the farm, and, quoting her language, "did

my business. I permitted him to do it in his own discretion and without much control from me." She further declares, in speaking of the transaction, that she entrusted it to her husband, as she did her other business. This evidence affords a complete explanation to the transaction, so far as the note is concerned. The husband testifies that he signed the note after his wife had signed it, and then sent it to the payees. According to his wife's explicit declaration, this he was authorized to do, under her authority and permission in the management of the business. She cannot now dispute the validity of the note, which was made and executed by both herself and her husband, in the exercise of his discretion under the plenary authority he held as her agent. This point of the case demands no further attention.

IV. The husband insists that he joined in the mortgage no farther than to relinquish his interest in the land as a husband; i. e., to surrender his right of "dower." His name appears in the mortgage as joining with his wife in the conveyance. But there are small marks drawn by a pen across his first name and the first letter of his surname, and the word "parties," as originally written, seems to have been altered in more than one place by changing it to the singular. All these alterations are very indistinct, and fail to strike the attention upon even a reasonably careful reading. It is quite clearly shown by the evidence of the scrivener who wrote the mortgage that these alterations were actually made before the instrument was signed by the parties.

As we have seen, the husband agreed to cause a mortgage to be executed to the payees of the note, which should be a lien upon the homestead of himself and wife. He had, as we have also seen, the full authority of the wife to conduct the business. In pursuance of this authority, and in fulfillment of this agreement, he sent the note and mortgage to the payees of the note, and, trusting in his honesty, they sent him \$3,500, as they had agreed to do. The alterations of the mortgage are so indistinct, and of such a character, that they

are well calculated to deceive. And the payees of the note were deceived by them. Shall the husband and wife reap the benefit of this gross fraud? It would be a reproach to the law and a defeat of justice if they were permitted to do so. But a most wholesome doctrine of equity stands in the way of all such attempts to defraud. It is the rule of estoppel, which Story declares "forms a very essential element in that fair dealings and rebuke of all fraudulent misrepresentations, which it is the boast of the courts of equity constantly to promote." 2 Eq. Juris., § 1533. Thus, "when a party by misrepresentations draws another into a contract, he may be compelled to make good the representation, if that be possible." Id. § 1538. The misrepresentation and fraud of the husband consisted in sending the note and mortgage to the payees in fulfillment of his solemn agreement, with alterations and erasures so made as to lead them to believe that the instrument created a lien on the homestead. The husband and wife would surely not claim that, if they had advised the payees of the note that the husband did not sign it, and that the mortgage did not bind the homestead, the money would have been sent them. The law will not permit the practice of such a fraud, but will compel them to make good their representations. The husband, as the active perpetrator in the fraud, can reap no advantage from it, and, as the wife entrusted the business without her control to her husband, she cannot enjoy gain or exemption from the consequences of the fraud. The familiar doctrine of equity upon which we base our conclusion needs no support here of adjudged cases. It cannot be questioned, and its application to this case is made plain by the facts. It is true that the law favors homestead rights. But the law will not permit such gross frauds to be perpetrated in their name, as is attempted in this case.

V. A question is made by defendants in regard to the sufficiency of a deposition, which we do not pass upon, for the reason that our conclusion renders it unnecessary to consider the testimony which it presents.

VI. The husband and wife pleaded a counter claim against their co-defendants, two of the payees of the note. No notice seems to have been served upon the defendants requiring them to answer the counter claim, and they entered no appearance thereto, and no issue was joined thereon, and no consideration appears to have been given it in the court below. The abstract contains nothing touching this counter claim, except the answer or cross bill pleading it. Its correctness upon this point is not questioned, and nothing in regard to the same matter is found in the amended abstract. The subject requires no further attention.

VII. The note provides for an attorney's fee of twenty-five dollars, and the mortgage provides for a reasonable attorneys fee to be adjudged against the mortgagors. But 2. ATTORNEY'S fee: provision in note and mortgage. the abstract fails to present any evidence as to the amount of the attorney's fee. We cannot determine the amount without evidence. The plaintiff, therefore, can be allowed no greater sum than is named in the note. That amount he may be allowed, and it may be included in the decree. The cause will be remanded to the court below for a decree foreclosing the mortgage against all the lands, and for a judgment against the maker of the note for the amount due thereon and attorney's fee, with costs; or, at plaintiffs option, such a decree may be rendered in this court.

REVERSED.

THE LOUIS COOK MANUFACTURING CO. V. RANDALL & DICKEY.

1. **Practice: EVIDENCE: ORDER OF INTRODUCTION.** A cause will not be reversed merely because secondary evidence of the contents of a written contract was admitted before the loss of the writing was established, when a sufficient foundation for the secondary evidence was afterwards supplied by the testimony of the adverse party.
2. **Contract: SECONDARY EVIDENCE TO ESTABLISH.** Where plaintiff succeeded to the business of C., and undertook the performance of a contract previously entered into between C. and defendants, and, in an action between plaintiff and defendants growing out of the transaction, plaintiff and C. denied the existence of the contract, it was proper to allow defendants to establish the execution and terms of the contract by secondary evidence.
3. **Corporation: ULTRA VIRES.** It is not *ultra vires* for a corporation organized for the manufacture of certain articles to assume to fill a contract made with another for furnishing such articles.
4. **Contract: TERMS OF ASSUMED BY THIRD PARTY.** Where defendants ordered goods of C. on certain terms, and plaintiff assumed to fill the order in C.'s stead, and shipped the goods to defendants, who accepted the same, plaintiff and defendants became parties to the original contract, and were both bound by the terms thereof.
5. —: **TO FURNISH GOODS ON CREDIT: MEASURE OF DAMAGES FOR BREACH OF.** Where plaintiff, doing business at Cincinnati, Ohio, assumed to furnish on credit to defendants vehicles for sale at Des Moines, Iowa, with the sole privilege to sell such vehicles in certain counties, the element of credit became an important element in determining the damages to which defendants were entitled upon a breach of the contract; and the measure of defendants' damages for such breach was the difference in the contract price of the vehicles and their market value in the city of Des Moines, with the exclusive privilege of selling such vehicles in the counties named in the contract, less the expense of bringing the vehicles from Cincinnati and fitting them up for the Des Moines market.
6. —: **LANGUAGE OF TRADE: EVIDENCE.** Where in a contract language is used which has a peculiar meaning understood by the trade, that meaning must be followed in enforcing the contract, and evidence of such meaning is properly admissible.

Appeal from Polk Circuit Court.

FRIDAY, DECEMBER 7.

ACTION at law upon an account for certain buggies and

62 244
97 619

62 244
111 100

62 244
122 232

62 244
136 386

other goods ordered by defendants of plaintiff. There was a judgment upon a verdict for plaintiff for a part of the claim, from which it appeals. The facts of the case are stated in the opinion.

William Phillips, for appellant.

Nourse & Kauffman, for appellees.

BECK, J.—I. The petition alleges that plaintiff is a corporation existing under the laws of the state of Ohio, and succeeded to the business of Louis Cook, in the manufacture and sale of buggies and other goods. That defendants, who had made purchases of Louis Cook, ordered from him certain goods. As the plaintiff had succeeded to his business, the order was by him delivered to plaintiff to be filled, which was done. This action is brought to recover the value of the goods delivered to defendants by plaintiff under such order.

The defendants in their answer admit the order for the goods and the receipt thereof, but allege that the purchase was made under a contract with Louis Cook, to the effect that buggies and other goods ordered should be furnished at prices named, upon thirty, sixty, ninety, or one hundred and twenty days, when ordered in car load lots, and that defendants were to have the exclusive right to sell the articles manufactured by plaintiff, in Polk and five adjacent counties of the state. The contract was expressed in a written order given by defendants, which was accepted by Louis Cook. Under this contract, defendants ordered the goods mentioned in the account sued upon, which were furnished to defendants by plaintiff under an order to Louis Cook.

The answer, admitting the receipt of the goods specified in the account sued on, alleges that the contract is in the possession of Cook or plaintiff, or is lost or destroyed; that plaintiff assumed its performance, but did violate its conditions by selling like goods described therein to other persons within

the counties mentioned in the contract; by refusing to sell upon the time provided for in the contract; by refusing to sell to defendants more than one car load at one time; and by refusing to ship to defendants goods by the car load until the bills for prior shipments to them had been paid. It is alleged that, by reason of these breaches of the contract between the parties, defendants sustained damages to the amount of \$4,000, which they plead as a counter claim to plaintiff's action.

Plaintiff in its replication denies that defendant and Louis Cook entered into a contract of the character alleged in defendants' answer, and denies that any such order as is pleaded therein was given by defendants to Louis Cook, or ever existed. It admits that it succeeded to the business of Louis Cook, but denies that it assumed his contracts and liabilities set up by defendants. All other allegations of the answer are denied.

Other allegations of the pleadings need not be here recited. It will be observed that the account sued on is admitted, and the only issues between the parties involve the counter claims of defendants.

II. We will consider the objections to the judgment relied upon by plaintiff in the order of their discussion by counsel. It is first objected that there was no competent evidence submitted at the time tending to establish the contract. The contract itself was not introduced in evidence. Defendants testified that it was reduced to writing in the form of an order written by Cook and signed by defendants, which was orally accepted by Cook before he transferred his business to plaintiff. It was kept by Cook, or left in his possession. Upon this evidence defendants were permitted to prove the contents of the instrument. If it be conceded that, when this proof was offered, the evidence was insufficient to show the loss of the instrument, or that proper efforts were not made to cause its production at the trial by Cook, yet, in view of the answer of

1. PRACTICE:
evidence:
order of in-
troduction.

plaintiff, denying the existence of the contract, and the testimony of Cook subsequently given, that he had not at the time and never had possession of the instrument, and that it in fact never had an existence, there is no prejudicial error in admitting proof of its contents at the time such evidence was admitted. Cook's evidence, if given at or before the time the secondary proof was admitted, would have been sufficient to authorize it. As he subsequently supplied the required proof, no prejudice resulted from admitting the secondary evidence at the time it was introduced. We will not reverse a case upon the ground that evidence is not admitted in the proper order, or for the reason that a fact which should be proved in the first instance by one party is established by the testimony of the other.

Counsel for plaintiff insists that, as Cook was not a party to the suit, no parol evidence of the contents of the instrument was competent therein. We think this position applied to the facts of this case is not supported by the authorities cited by counsel, nor by principle. Under the pleadings of the case, and the evidence of defendants, their theory of the case is that the plaintiff by undertaking to perform Cook's contracts, as successor to his business, became bound by the contract with them; that it in fact became plaintiff's contract. It was under this theory necessary for defendants to establish, first, that the contract was entered into, and then to show that plaintiff assumed its performance. In order to establish the original contract, they were compelled to resort to secondary evidence, as we have just shown. The contract was in fact the contract of plaintiff, having so become by his undertaking to perform it. As its existence was denied by plaintiff and by Cook, it was a proper subject of secondary evidence, as we have above shown.

III. It is insisted that the plaintiff, under its charter or articles of incorporation, had no authority to assume the performance of the contract with Cook. The business of plaintiff is the manufacture and sale of

2. CONTRACT:
secondary
evidence to
establish.

3. CORPOR-
ATION: ultra
vires.

buggies and other articles. Of course, it has authority to accept orders for such goods upon terms usual in such business. It surely had authority to assume the filling of an order accepted by Cook, upon the terms made by him, which, it appears, was in accord with the usual course of the trade. This is just what plaintiff did in this case.

IV. It is said that the cross petition and proof do not show that plaintiff agreed to perform Cook's contract, and that there is no agreement between plaintiff and defendants proved. Defendants gave the order to Cook under the contract with him; plaintiff assumed to fill it, and shipped the goods for which suit is brought, which were received and accepted by defendants. Surely the law will imply a contract between plaintiff and defendants. The plaintiff, by filling the order, became, as we have seen, bound by its terms. Defendants, by accepting the goods, became bound to plaintiff according to the conditions of the contract which plaintiff had assumed. The point demands no further attention.

V. The circuit court gave to the jury an instruction in the following language:

"In determining whether or not the plaintiff *assumed to perform* Louis Cook's part of the alleged contract with defendants, you should take into consideration *the relation of the parties, the manner in which the business was done, all their acts and declarations, the manner in which orders were received, shipments made, and all other facts and circumstances fairly tending to show what the agreement was.*"

This instruction is, we think, correct. The fact that plaintiff was the successor of Cook in business is a matter pertaining to their relations, and its acceptance of orders given originally to Cook pertains to the manner of their business. The acts and declarations of these parties, so far as shown by the evidence, are contemplated by the instruction. These, with the other matters referred to, were properly considered by the court as facts from which the jury were authorized to find that plaintiff assumed Cook's contract.

VI. The circuit court directed the jury in the following language: "If upon inquiring, as before directed, you find that the defendants are entitled to damages, you will then proceed to determine the amount you will allow. The measure of defendants' damages for a refusal to sell them vehicles under the contract is the difference in the contract price of the vehicles refused to be furnished and their market value in the city of Des Moines, with the exclusive privilege of selling that make in the counties named, less the expense of bringing said vehicles from Cincinnati, Ohio, and fitting them up for the Des Moines market."

5. CONTRACT:
to furnish
goods on cred-
it: measure
of damages.

The views of plaintiff's counsel upon the subject of the measure of damages are expressed by an instruction asked by him at the trial and refused. It is as follows:

"That if you find there was a contract existing between defendants and Louis Cook, such as alleged in the petition, and you find that the plaintiff agreed to perform the same, and undertook such performance, and you find that it refused to sell the defendants the goods named on the time specified, but was ready and willing to furnish said goods to defendants as they wanted them, and offered so to do, for cash, or in car lots on time or credit, then the defendants should have taken said goods and paid cash therefor, or taken the same on credit, one car at a time, and plaintiff would be liable only for the interest at six per cent for the time credit was to be given."

The rulings of the circuit court upon these instructions are correct. The object of defendants in making the contract for time was to be able to deal in the goods upon credit. Now, to say that credit is refused, when the contract provides that it shall be given, the defendants being required to purchase for cash, is to deprive them of the very benefits the contract contemplates they shall receive. It is true, as is said by counsel for plaintiff, that defendants were required to do "all they reasonably could do to prevent damages."

The Louls Cook Manufacturing Co. v. Randall & Dickey.

But to require them to pay cash when they had contracted for credit, is not within the bounds of reason. The condition as to credit was an important and essential provision of the contract. The law will not presume that defendants could have paid cash for the goods, and it surely did not require them to do what they are not shown to have been able to do.

VII. The plaintiff insists, and requested the circuit court to so instruct the jury, that the measure of defendants' damages is the difference between the contract price and the value of the goods at Cincinnati. The position is not correct. The buggies were purchased for sale in Des Moines, and, while plaintiff by the terms of the contract was to deliver them upon the cars at Cincinnati, this did not imply anything more than that defendants were to pay transportation to Des Moines. But if defendants acquired the absolute property in the buggies when they were delivered to the carrier at Cincinnati, plaintiff's contract contemplated that defendants were to sell them at Des Moines. The prices at the last named city control in fixing the measure of damages.

VIII. The contract and order for the buggies specified "top buggies with poles." A witness engaged in the trade was permitted to testify against plaintiff's objection that these words in the order would be understood to mean a common grade of buggies. The evidence is competent. The language had a meaning understood by the trade, and that meaning must be adopted in enforcing the contract. It is very common for the courts thus to obtain the true meaning of the language of contracts.

IX. Numerous objections are made to instructions given, which are really but criticisms upon the language used therein. By these criticisms counsel seeks to interpret the instructions so that they are made to express thoughts other than those intended by their plain language, which expresses

G. CONTRACT:
language of
trade: evi-
dence.

Foye et al. v. Walker.

rules in harmony with the law. The consideration of these criticisms would be without profit to the parties.

X. The evidence was conflicting, and there is no ground for disturbing the verdict as being unsupported by the evidence. The judgment of the circuit court will be

AFFIRMED.

FOYE ET AL V. WALKER.

1. **Appeal to Supreme Court: LESS THAN \$100: TIME OF MAKING CERTIFICATE.** Where an appeal is sought in a cause involving less than \$100, the certificate required in such a case must be made and filed at the time of the rendition of the judgment. It is not sufficient that it be made at the same term.

69	351
78	509
69	251
86	572
62	251
97	736

Appeal from Dallas Circuit Court.

FRIDAY, DECEMBER 7.

ACTION for an injunction to restrain the collection of a judgment. There was a decree for the plaintiffs. The defendant appeals.

Cardell & Shortley, for appellant.

White & Clark, for appellees.

ADAMS, J.—The judgment, the collection of which the plaintiffs seek to enjoin, is for \$10 debt and \$24.35 costs. The case comes to us upon a certificate. The decree appealed from was rendered August 11, 1882. The certificate was made and filed during the same term, but not until August 16, 1882. The appellees insist that the certificate was not made and filed in time, and that accordingly this court has not acquired jurisdiction.

Section 3173 of the Code, which provides for the certificate, does not expressly provide within what time it shall be made and filed. The defendant does not deny that it should be done at the same term. It was so held in *Nicely v. Rogers*, 39 Iowa, 441; *Lomax v. Fletcher*, 40 Iowa, 705, and *Rose v. Wheeler*, 49 Iowa, 52. But the defendant insists that in no case has the court had occasion to go farther than that, and that it ought not to go farther.

The appellees rely upon *Hershfield v. First National Bank*, 39 Iowa, 699, and *Hakes v. Dott*, 54 Iowa, 17. In the former case the court said: "As we understand that section, such certificate must be made at the time of the trial of the cause, and then made a part of the record." In the latter case that ruling is cited and followed. It is true that it did not expressly appear in either case, as it does in the case at bar, that the certificate was made and filed *during the term*; but it is manifest that that was not regarded as the test. The reasoning is that it should be apparent of record, from the time of the rendition of the judgment, whether an appeal lies or not. We see no reason to depart from the construction adopted. At no time is the trial judge better qualified to certify any question which he desires to certify, and it seems to us reasonable and proper that parties should have at all times the means of knowing what their rights are, in order that they may govern themselves accordingly.

We have to say that we think that the appellee's position is well taken, and that the appeal must be

DISMISSED.

ODELL ET AL. V. GALLUP ET AL.

1. **Promissory Note: ALTERATION: BURDEN OF PROOF.** A defendant who admits the execution of a promissory note sued on, but alleges that it has been altered since its execution, has the burden of proof to establish the alteration.
2. **Chattel Mortgage: FORECLOSURE IN EQUITY: IDENTITY OF GOODS: EVIDENCE.** Where G. mortgaged a certain building and the stock of goods therein to plaintiff, and afterwards removed the goods to another building, and then made a second mortgage of the goods to W., describing them as situated in the second building, in an action against G. and W. to foreclose the first mortgage, *held* that plaintiff was properly permitted to prove the removal and identity of the goods, without any allegations of removal and identity in his petition.
3. ———: **PRIORITY: PRESUMPTION.** Where a chattel mortgage was made upon a stock of goods, and afterwards another mortgage was made to another upon the same stock, and it appeared that *some* of the original goods were on hand when the second mortgage was made and when the action for foreclosure of the first mortgage was begun, and it did not appear what, if any, goods had been added to the stock, or the value thereof, *held* that, since the court is unable to determine that the first mortgage did not cover *all* the remaining goods, it must be given priority over the second mortgage as to all.

Appeal from Dallas Circuit Court.

FRIDAY, DECEMBER 7.

ACTION to foreclose a chattel mortgage. The relief asked by the plaintiffs was granted, and defendants appeal.

White & Clark and *Barcroft, Bowen & Sickmon*, for appellants.

D. W. Woodin, for appellees.

SEEVERS, J.—In May, 1881, the defendant, Gallup, executed a chattel mortgage to I. M. Murray, deceased, on property described as follows: "A certain frame building *
* * on lot 1, Block 16, Adel, Iowa, privilege being given the mortgagor to remove the same to any other lot in

62	253
81	97
62	253
88	631
62	253
96	111

Adel, Iowa; also all furniture, of whatever nature or kind, located and being in said building, and being the stock in trade of said mortgagor; privilege being given to said Gallup to sell and retail any of said furniture, and to add thereto as he may deem best. It is also agreed that said E. Gallup shall keep said stock fully up to present amount on hands." The mortgage was given to secure a promissory note for \$300, given for money borrowed. Said note was due in one year after date. While the note on its face was for the amount above stated, a credit of \$67 was endorsed thereon, as of the date the note was given, so that in fact the amount due was \$233. About the time the note became due, Murray let Gallup have \$67 more money, and the note aforesaid was taken up and a new note for \$300 was given. The mortgage was not released, and it was the understanding between Gallup and Murray that it should stand as security for the new note. The petition states that the defendant, White, trustee, claims some interest in the mortgaged property adversely to "plaintiffs, by virtue of a certain chattel mortgage execute by E. Gallup to him, June 30, 1882, and recorded in book 56, on page 55, of chattel mortgage records in Dallas county, Iowa." A copy of such mortgage was attached to the petition and made a part thereof. In an amendment to the petition it was stated that said White, trustee, also claimed an interest in said property adversely to plaintiff, under a mortgage executed subsequently to the one last above referred to.

The defendant, Gallup, denied the execution of the note and mortgage under which plaintiffs claim, and the defendant, White, denied the allegations of the petition. The case is triable anew in this court.

I. As to the defense pleaded by Gallup. He admitted on the trial that he executed the note and mortgage, and, as we understand, simply claims that the date of the

1. PROMIS-
SORY note:
alteration of:
burden of
proof.

note has been altered since its execution. Conceding that such defense was pleaded, the burden was on Gallup to establish it. This, we think, he has failed to do by a preponderance of the evidence.

II. As to the defendant, White, trustee. The mortgage under which plaintiffs claim was duly filed for record and recorded. White had constructive notice. The money secured by the mortgage has never been paid. The plaintiffs are entitled to have it foreclosed and the mortgaged property sold, unless White has shown some reason why this should not be done. No affirmative defense was pleaded by him. Evidence, however, was introduced, which he claims shows that as against him plaintiffs' mortgage should not be declared the prior lien on the property in controversy.

2. CHATTEL
mortgage:
foreclosure in
equity: identity
of goods:
evidence.

After the execution and filing for record of the mortgage under which the plaintiffs claim, Gallup executed certain mortgages to White, trustee. The property mortgaged is therein described as follows: "All my stock of furniture and merchandise of whatever kind now in my possession in the store building on the following real estate: Commencing 88 feet west of the southeast corner of lot No. 8, in Block No. 13, in the town of Adel," etc.

It is said that the mortgage under which plaintiffs claim is on one stock of goods, and White's upon another, because they are described as being in buildings situate upon different lots and blocks in the same town, and that there is no allegation in the petition which states that the goods had been removed from one store to the other, or that the same goods were included in all the mortgages.

The petition seeks to foreclose a mortgage on certain goods, and it is therein stated that White claims an interest in the goods under a mortgage recorded in a certain book, etc., and a copy of the mortgage is attached to the petition. This mortgage was introduced in evidence by Mr. White. But for this it would not have appeared that White had any such interest as entitled him to the protection of the court.

It further appears in evidence that the goods, or a part of them, described in plaintiffs' mortgage, were removed from the building therein described, and placed in the building de-

scribed in White's mortgage, before the latter was executed. This evidence is objected to, because there is no allegation in the petition of such removal. White, as has been stated, did not plead any affirmative defense, nor did he disclaim having an interest in the mortgaged property. On the contrary, by the introduction of his mortgage in evidence, he claimed an interest. Now the question is whether the property described in the mortgages is the same. We think evidence may be introduced showing this fact, in the absence of any allegation in the pleadings. The only question is one of identity. The property is described differently in the mortgages, but it is in fact the same. Clearly, we think, evidence may be introduced so showing, and evidence showing the removal from one building to the other is admissible for this purpose.

III. But, it is said, plaintiffs must show that all the goods described in the White mortgage are described or included in ^{3. — : priority: presumption.} plaintiffs' mortgage. The evidence as to this is indefinite and uncertain. After the execution of the mortgages, goods were sold at retail in the usual way, and other goods purchased. But the evidence fails to show the description or value of the goods so sold and purchased. It, however, appears that the goods described in plaintiffs' mortgage were of the value of about \$400, and at the time White's mortgage was executed there was on hand of said goods "from \$200 to \$300 (worth), maybe a little more." The evidence fails to show the value of the goods on hand at the time of the trial. It does not certainly appear that any goods were purchased after the execution of White's mortgage. It is said the plaintiffs' mortgage does not cover after acquired property. Its provisions are different from those contained in the mortgages in *Scharfenburg v. Bishop*, 35 Iowa, 60; *Stephens v. Pence*, 56 Id., 257; and *Phillips & Son v. Both*, 58 Id., 499; but the provisions as to after acquired property are more nearly like the latter than either of the former cases. It is, therefore, regarded as doubtful whether such property is covered thereby.

McCarty v. James.

But it satisfactorily appears that some of the property included in plaintiffs' mortgage was on hand at the time White's mortgage was executed, and as it does not appear what, if any, goods have been added to the stock, or the value thereof, we feel compelled to say that the plaintiffs are entitled to priority, for the reason that we are unable to say that there are any goods in controversy which plaintiffs' mortgage does not cover; and the evidence clearly shows that it does cover at least some of the goods on hand, and, for aught we can possibly tell, it covers all of them.

AFFIRMED.

McCARTY v. JAMES.

1. **Special Verdict:** NO EVIDENCE TO SUPPORT: NEW TRIAL. Where a jury, besides its general verdict for defendant, made certain special findings on material points in defendant's favor, which had no support in the evidence, *held* that the general and special verdict should have been set aside and a new trial granted.

Appeal from Warren Circuit Court.

FRIDAY, DECEMBER 7.

THIS is an action against the defendant as the indorser of a promissory note for \$1,000, executed to the order of defendant by one Jephtha Turner. The defendant for answer alleges that he was insane at the time he assigned the note to the plaintiff, and that he exchanged the note for one-half the plaintiff's stock of hardware and business in Indianola, which the plaintiff represented to be worth \$1000, but which, in fact, was not worth one-half that amount. There was a jury trial, resulting in a verdict and judgment for defendant. The plaintiff appeals.

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Todhunter & Hartman and *H. W. Maxwell*, for appellant.

Henderson & Berry, for appellee.

DAY, CH. J.—The evidence shows that the defendant assigned the note in question, before maturity, to the plaintiff, in exchange for one-half interest in a stock of hardware; that the defendant afterward was adjudged insane, and a guardian was appointed, who returned the stock of hardware to the plaintiff, and received from him therefor a note for \$700, secured by mortgage, which the defendant, after he recovered his sanity, took possession of and sold. The court submitted to the jury the following special finding: "Do you find that it was mutually agreed between the plaintiff and the guardian of the defendant, that the defendant's liability on the note in suit was fully settled and satisfied at the time the \$700 note was given?" To this the jury answered: "Yes." This special finding is altogether unsupported by the evidence. But three witnesses testified with reference to the giving of the \$700 note. M. F. Clark, the defendant's guardian, testified as follows: "He said he had sold and transferred the \$1000 note which James endorsed to him, and he gave his note for \$700 for James' half of the said stock of hardware. When I sold it back to him, I don't remember that there was anything said in that settlement about James' liability on his endorsement on the \$1000 note. I did not then know anything about that endorsement." On cross examination this witness said: "There was nothing said in the settlement I made with McCarty about the \$1000 note." The plaintiff testified as follows: "I paid him \$700 in my note and mortgage at ten per cent. At the time I bought back his half of said store, there was nothing said about the \$1000 note that I got of him when he bought half the store. Clark wanted to get James out of the business, because he was not adapted to it. He wanted to sell his interest back to me,

McCarty v. James.

and said he would take less than I got for it. He and I agreed upon \$700 for it. Then I gave him the \$700 note and mortgage, and took his half of the goods." J. E. Williamson, who was present when the arrangement was effected, testified as follows: "My recollection is that, when Mr. Clark, guardian of Otey James, settled with E. K. McCarty, there was nothing at all said about the \$1000 note." This is all the testimony there was upon the subject. It is incomprehensible how the jury upon this testimony could have found "that it was mutually agreed between the plaintiff and the guardian of the defendant that the defendant's liability on the note in suit was fully settled and satisfied at the time the \$700 note was given."

The court also submitted the following special finding: "Do you find that the plaintiff knew the defendant to be insane at the time the note was endorsed." To this, also, the jury answered: "Yes." This answer finds as little support from the testimony as the preceding one. The evidence shows without any conflict that up to the time of the trade in question the defendant was engaged in his ordinary business, and it does not appear that the plaintiff or any one else had any suspicion that he was not sane, until after the trade was made. These findings are very material, and it is impossible to tell to what extent they influenced the general verdict. The motion for a new trial should have been sustained.

REVERSED.

WILSON V. IRISH.

1. **Contract for Land: RESCISSION AFTER POSSESSION TAKEN.** The grantee of real estate under a contract, after he has taken possession, cannot have the contract rescinded because his grantor has fraudulently, and in violation of the contract, kept him out of possession for a time. He will be remitted to his action at law for his damages for the detention.
2. **Evidence: BREACH OF WARRANTY: DECLARATIONS OF PERSON IN POSSESSION.** In an action for a breach of warranty in the conveyance or real estate, the declarations of the person in possession, as to the right by which he holds possession, are admissible in evidence as a part of the *res gestae*.
3. —: **HANDWRITING: STANDARD OF COMPARISON.** Where the evidence of the genuineness of a letter was meager and unsatisfactory, it was error to admit it in evidence as a standard of comparison whereby the jury should determine the genuineness of another letter alleged to have been written by the same person.
4. —: **CONVERSATION IN PRESENCE OF ANOTHER: QUESTION FOR JURY.** Where a conversation occurred in the presence of a party, it was not for the witness or the court, but for the jury, to determine from all the circumstances whether the party heard the conversation or not.
5. —: **CONVERSATION BETWEEN PARTIES: QUESTION FOR JURY.** Where a remark made by defendant to plaintiff was material, if made *before* the delivery of a deed, but the evidence was conflicting as to whether it was made before or after, the evidence concerning the remark should all have gone to the jury, and it was for the jury to determine whether it was made before or after the delivery.
6. —: **BREACH OF WARRANTY: BURDEN OF PROOF.** In an action for a breach of warranty in a conveyance of land, where the breach complained of was a prior conveyance to another, the burden of proof to establish such prior conveyance was upon the plaintiff.
7. **Conveyance: QUIT-CLAIM DEED: WHAT IS NOT.** A conveyance which employs the words—"have bargained, sold and quit-claimed, and by these presents do bargain, sell and quit-claim * * * * * all our right, title and interest, estate claim and demand, both at law and in equity, and as well in possession as in expectancy," is not a mere quit-claim deed. See *Sibley v. Bullis*, 40 Iowa., 429.
8. **Damages: BREACH OF COVENANT OF WARRANTY.** In an action for a breach of covenant of warranty, the mere fact that there is an outstanding superior title, which has never been hostilely asserted, will not authorize the recovery of the consideration money.

Appeal from Van Buren Circuit Court.

FRIDAY, DECEMBER 7.

THE plaintiff brings this action for the recovery of damages for an alleged breach of warranty in a conveyance of certain real estate, situated in the state of Missouri. The defendant, by way of cross petition, alleges that the land described in the petition was traded to plaintiff in part consideration for some land conveyed to the defendant by plaintiff, and that the plaintiff fraudulently extended the time of a lease upon said premises, whereby the defendant was kept out of the possession of the premises for one year, to his great damage. Defendant prays that the trade may be rescinded and canceled. The defendant thereupon moved to transfer the cause to the equity docket, for the reason that it involves equitable issues. The motion was overruled. The plaintiff filed a demurrer to the cross-petition, which was sustained. The trial was to a jury, and resulted in a verdict and judgment for plaintiff for \$1,722.46. The defendant appeals. The cause was before us on a former appeal. See 57 Iowa, 184.

Stiles & Beaman and Wright, Cummins & Wright, for appellant.

Robert H. Starr and Wm. M. Walker and C. C. Cole, for appellee.

DAY, CH. J.—I. The first error insisted upon is the sustaining of the demurrer to the cross petition, asking a rescission of the trade. The trade between the parties was made on the 27th day of March, 1875. In August, 1874, Wilson leased to Brown, for the period of one year from the 1st of March, 1875, the premises by Wilson conveyed to the defendant. This lease contains the following reservation: "Wilson reserves the privilege of selling the farm and giving possession at any

1. CONTRACT
for land:
rescission
after posses-
sion taken.

time *after one year*." The defendant alleges in his cross-petition that, when the lease was exhibited to him, pending the negotiation, the italicised words were not in the lease, and that they were fraudulently added after the terms of the trade were agreed upon, and before the execution and delivery of the deeds, and that by reason of this fraud the defendant was kept out of possession for one year. This action was commenced in February, 1877, and this cross-petition was filed September 27th, 1877; so that, as appears from the cross-petition, the defendant had been in possession for eighteen months when the cross-petition was filed. The defendant, having taken and held possession of the property, cannot rescind the trade because he was kept out of possession for a time, but will be remitted to his action at law for damages. The demurrer to the cross-petition was properly sustained.

II. The plaintiff testified that about the middle of April, after he received his deed for the Missouri land, he went to the land to see it, and found one John Finch living on it and plowing it. Against the objection of defendant, the plaintiff was permitted to testify that "Finch said that he was in possession from W. S. Gatling; that he got possession from Gatling. This action is assigned as error. The evidence is, we think, admissible, under the principles announced in 1 Greenleaf on Evidence, §§ 108-9.

III. The plaintiff testified that he received two or three letters from Finch. He was then shown a letter as follows:

"GREENTOP, SCUYLER Co., Mo., June 12, 1876.

"MR. WILSON: Yours of the 6th is at hand. You wanted to know if I consider Mr. Gatling the owner of the farm. I do consider him the owner of it. I still hold the rent money till it is settled.

Yours truly,

"JOHN FINCH."

The witness testified: "I don't think I ever saw Finch

write, nor any letter that I knew he wrote. I can say that I know that is his handwriting." The witness was then asked how many letters in all he had received from Finch, and answered: "I guess two or three." The witness was then shown the following letter:

3. —:
hand writing:
standard of
comparison.

"GREENTOP, December 27th, '75.

"MR. WILSON:—

"*Sir*: Time is drawing near to settle the rent of the Irish farm. If you have any objection of me settling with Mr. Gatling please let me know. In haste.

"JOHN FINCH, Greentop, Mo."

The witness testified as follows: "I got this letter through the mail. * * I think I was there the February following its receipt."

Q.—State whether this letter had anything to do with your going down there?

A.—I think I complied with his request.

Q.—When you was down in Missouri, did you have any conversation with him about having written to you about this matter?

A.—I presume I did.

Q.—What did he say about it—about having written to you?

A.—I couldn't say exactly what he said.

Q.—You recollect that he did say something about having written; what is your best recollection?

A.—My impression is that he did.

Thereupon the plaintiff offered the letters in evidence. The defendant objected. The court held that the letter of date, June 12th, 1876, might be introduced as evidence, and the letter of December 27th, 1875, might be introduced for the purpose of comparing with it the letter of June 12th, to show who wrote it. This action is assigned as error. It is to be observed that there is no proof whatever of the genuineness of the letter of June 12th, except what arises from a comparison of it with the letter of December 27th. The evidence of the genuineness of the letter of December 27th is very

meagre and unsatisfactory. The witness first answers that he thinks he did not see Finch and talk with him about the letters after they were written. Afterward he says he presumes he had a conversation with Finch about having written him, and that his *impression* is that Finch said *something* about it. In regard to the admission of papers for the mere purpose of furnishing the jury a standard of comparison, it is said in 1 Greenleaf on Evidence, § 580, that the modern English decisions are clearly opposed to it, and in section 581 the rule as extracted from American decisions is declared to be: "That such papers can be offered in evidence to the jury only when no collateral issue can be raised concerning them, which is only when the papers are conceded to be genuine, or are such as the other party is estopped to deny, or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony." It is clear that the letter of December 27th, 1875 does not fall within this rule. We think there was error in the admission of each of the letters in question.

IV. The evidence tends to show that, before the conveyance to the plaintiff, the defendant contracted the land to one Gatling, and executed a deed, which was deposited with one Moore as an *escrow*. The defendant testified to a transaction which occurred afterward at the office of Moore, in which he claims that this contract was rescinded, and the deed was surrendered to him. Moore was introduced as a witness. His attention was directed to this occurrence, and he was asked: "What was said there at the time about the trade being rescinded?" To this he answered: "There was a remark made by Irish—Gatling was in the room; I can't tell whether he heard the remark or not. My impression at the time was that he did not. He was about as far as from me to the counsel there. There was nothing occurring to prevent his hearing. My reason for thinking he did not was, that Irish spoke in a suppressed

4. ———: conversation in presence of another; question for jury.

Wilson v. Irish.

tone, between a whisper and a loud tone." The witness was then asked to state what was said, and, upon plaintiff's objection, the witness was not permitted to answer. In this ruling we think there was error. The defendant had the right to be corroborated by a person present at the transaction about which he had testified. It was not for the witness nor the court, but for the jury, to determine from all the circumstances whether Gatling heard what occurred in his presence.

V. Rutledge Lea, who drew the papers between the plaintiff and the defendant pertaining to their trade, was introduced as a witness for defendant, and testified that he heard a conversation between Wilson and Irish about the Missouri land about the time the deeds were made, during the time they were making the trade, and that Irish said that the Missouri land was not worth more than \$500. Upon cross-examination the witness said: "I think Irish said the land wasn't worth over \$500 after the deeds were delivered. The deeds were right on the table. I can't say there had been a manual delivery of them. They were completed, but I don't know as Wilson had picked them up." The plaintiff thereupon moved to withdraw from the jury all of the evidence of this witness relating to Irish's remark about the value of the Missouri land, because the statement was made after the transaction was completed. The court sustained the motion. The defendant, with reference to this same transaction, testified that this statement was made by him when they were discussing the amount of consideration to be put in the deed. This evidence should have been allowed to go to the jury, and it should have been left for them to determine whether or not the statement was made before the transaction was completed. Even if made immediately after the deeds were delivered, the remark would be admissible as part of the *res gestae*. And, if Wilson made no reply, or manifested no surprise, it would tend to corroborate the testimony of Irish, that he "told Wilson several times that the Missouri land was not worth to exceed \$500.

5. — : conversation between parties: question for jury.

VI. During the trial of the cause, a question arose as to the burden of proof, and the court held that, if plaintiff never took possession of the premises and defendant
 6. ———: breach of warranty: burden of proof never placed him in possession, then the burden was on defendant. The same doctrine was announced in instructions. The petition is somewhat indefinite. It does not clearly appear whether the plaintiff seeks to recover at all upon the ground that the defendant never had title to the land. The petition, however, does allege as a specific ground of complaint that, when the plaintiff attempted to take possession of the Missouri land, he found one Gatling in possession under a purchase from defendant prior to plaintiff's purchase.

So far as this particular breach is concerned, it admits by implication that the title was at one time in defendant, and claims that it was divested by sale to Gatling. The answer simply denies the allegations of the petition. Under the pleadings in this case, we think the burden of proof is upon plaintiff, in so far as the alleged conveyance to Gatling is concerned. See *Jerald v. Elly*, 51 Iowa, 321.

VII. Before the alleged conveyance from defendant to Gatlin, the defendant executed a title bond to one Morgan, which the defendant afterwards foreclosed, thus
 7. CONVEY- ANCE: quit-claim deed: what is not. divesting Morgan's title. The defendant insists that the deed to Gatling was a mere quit-claim, passing, not the title to the land, but simply the defendant's interest therein. The deed to Gatling employs the words, "have bargained, sold and quit-claimed, and by these presents do bargain, sell and quit-claim * * * all our right, title and interest, estates, claim and demand, both at law and in equity, and as well in possession as in expectancy." This deed is not a mere quit-claim. See *Sibley v. Bullis*, 40 Iowa, 429.

VIII. The court instructed the jury as follows: "If you find that defendant did not have title to the Missouri land at the time he conveyed the same to plaintiff, then you
 8. DAMAGES: breach of covenant of warranty. will find for plaintiff on his cause of action, and will assess his damages at the purchase price of said

Hadley v. Stuart.

land, with six per cent. interest thereon." This instruction entirely ignores the defendant's claim, that the plaintiff took possession of the property and rented it to Finch. The mere fact that there was an outstanding superior title, which had never been hostilely asserted, would not authorize the recovery of the consideration money. 3 Washburn on Real Prop., 478.

Many other objections have been urged to the judgment, but we think what has been already said indicates our general view of the case, and may render the other questions immaterial upon the retrial. For the reasons assigned, the judgment is

REVERSED.

HADLEY V. STUART.

62	267
98	153

1. **Resulting Trust: FACTS NOT CONSTITUTING.** Where a testator provided in his will that his widow should have the use and benefit of his farm for the support and education of his children until one of them should become of age, and that it should then be sold, and the proceeds be divided among his heirs, but the widow, with no further power, sold the land and gave a bond to the purchaser to procure for him a good title in the future, and then purchased other land with the consideration money, *held* that the widow conveyed only her own interest in the land, whatever that was, and that the interest of the heirs remained intact; that the consideration money paid the widow in excess of her interest was in consideration of her bond; that the heirs had no resulting trust estate in the land purchased by the widow, and that the plaintiff, one of the heirs, did not acquire such trust estate by the fact that he was induced by the widow, after his majority, to convey his interest in the original land to the widow's grantee, upon her representation that she held the land purchased by her in trust for the heirs.
2. **Estates of Decedents: REALTY TREATED AS PERSONALTY.** While, under the provisions of a will, realty directed to be sold may sometimes be treated as personalty, the facts in this case do not warrant the application of the rule.

Appeal from Guthrie Circuit Court.

FRIDAY, DECEMBER 7.

ACTION in equity to establish a trust in certain land em-

braced within the town plat of the town of Stuart, Guthrie county. The defendant demurred to the plaintiff's petition, and the demurrer was overruled. From the order overruling the demurrer the defendant appeals.

Charles S. Fogg, for appellant.

J. H. Applegate, for appellee.

ADAMS, J.—The land in question is an undivided sixth part of eighty acres. The facts as shown by the petition are in substance as follows: The defendant's title, whatever he has, was acquired in 1868 by deed from one Deborah B. Lewis, formerly Deborah B. Hadley, the plaintiff's grandmother. She had purchased the property in 1857, and taken the title in her name. The plaintiff claims that she purchased it in part with money that belonged to his father, one Amos Hadley, who has since died intestate; that a trust resulted to Amos Hadley, and that upon his death his beneficial interest in the land descended to the plaintiff. Respecting Amos' interest in the money with which the land was purchased, the facts set out are as follows: It was purchased with certain money which Deborah acquired in the sale of certain land in Indiana. This land formerly belonged to Deborah's husband, Wm. M. Hadley, who died testate in 1845. The land constituted his farm. In his will he made a devise of it in the following words: "It is my will that she (Deborah) have the use and benefit of my farm to raise and educate my children, until my son Thomas arrives at the age of twenty-one years, and at that time it is my will that my real estate all be sold, and the proceeds arising therefrom be equally divided between all my heirs." The will also provided that if Deborah ceased to remain a widow the real estate should be sold and divided equally between the heirs. By the will, one Joseph Hadley was appointed executor, who qualified and administered, and was discharged many years ago. Thomas died in 1850, at

1. RESULTING
trust: facts
not constitut-
ing.

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the age of fourteen. The sale of the Indiana land by Deborah was made in 1855. Afterward she married one Lewis. Amos, the plaintiff's father, was one of the testate's heirs. He died in 1862. In 1855, at the time of the sale by Deborah, Amos was a minor. He did not join in her conveyance, but, after he became of age, in 1861, he executed a separate deed of the land to her grantee. Before that time, Deborah had used the money which she received from the grantee, in the purchase of the land in question in Guthrie county. Amos was paid nothing at the time he executed his deed, nor at any time. Deborah had given a bond whereby she obligated herself to procure a good title to be made to her grantee, and Amos was induced to execute a deed in order to discharge his mother from the bond, so far as his deed would have that effect; she representing to him that she had used the money which she received for the land in the purchase of the Guthrie county land, and that she held the latter in trust for her husband's heirs. When Deborah sold and conveyed to the defendant, Stuart, she informed him that the plaintiff, as heir of Amos, and then a minor, had an interest in the land. The foregoing are the material facts set out in the plaintiff's petition and relied upon by him; and the question presented is as to whether they constitute a cause of action.

They do not, unless it appears from them that the money with which Deborah purchased the Guthrie county land belonged, in part at least, to Amos. To determine how this is, we need to go back to W. M. Hadley's will. As to the interest which Deborah took under the will, the parties are substantially agreed. The plaintiff in his argument says: "The widow had only the use and benefit of the farm (the Indiana land) for the purpose of raising and educating the children." That she had that much during the time limited there is no ground for dispute, and no dispute in fact. Now, her interest being settled, there would seem to be no difficulty in arriving at the interest of the so called heirs. Un-

der the will, they took the remaining interest. The farm, then, passed to the heirs, subject to the widow's right to the use and benefit thereof during the time limited. Whether her right as devisee of the use and benefit had terminated at the time of her sale, we need not inquire. The plaintiff claims nothing upon the theory that it had not, and we shall treat the case as if it had. At the time, then, of the sale by Deborah, the land belonged to the heirs, and no one else. If she was entitled to anything under the denomination of heir, then her sale, of course, carried her interest, legal or equitable. Whether it had the effect to carry the interest of the others depends upon whether she had the power to sell and convey their interest. It does not appear that either she or her grantee claimed that she had. Her grantee was not satisfied with her deed, but exacted a bond, and a bond was given by her, conditioned that she would thereafter procure a good title to be made. Their view as to her want of power to sell and convey the interest of others was unquestionably correct. She could derive such power only from the will, and there is no pretense that the will conferred it. The will merely provided that the land should be sold, and appointed a person to execute the will. Whether the executor had the power to sell without being expressly clothed with such power, we need not determine. The important fact is that, whoever may have had the power to sell, the widow had not. As, then, her sale and conveyance carried no interest other than her own, and was not understood to carry any other, the money paid her, other than for her own interest, was paid her for her bond. No copy of her deed is set out, but, as she had no power to convey any interest but her own, we will not assume that she attempted to do so. Whatever interest, then, Amos, through whom the plaintiff claims, had in the land, that interest remained to him after Deborah's sale, the same as before. Having been divested of nothing by Deborah's transaction, he acquired nothing by it. He acquired no interest in the money paid to her. It was all rightfully

Hadley v. Stuart.

hers, and she needed it to enable her to protect herself against her bond. She had yet to procure a complete title to be made, and at her expense. The matter stood in this way until Amos became of age, and until some years after Deborah purchased the land in her name in Guthrie county, which the plaintiff is seeking to reach. When Amos became of age, he was applied to for a deed of his interest in the Indiana farm. For reasons satisfactory to himself, he was induced to give the deed. Up to that time he could have had no interest in the Guthrie county farm by reason of his interest in his father's estate, because that interest had remained intact in the Indiana farm. If, then, he acquired any interest in the Guthrie county land, he acquired it at, or subsequent to, the time when he parted with his interest in the Indiana farm. The petition avers that Amos' deed was executed upon representations made by Deborah that she would hold for him an interest in the Guthrie county land. Whether he had any intention of claiming as against his mother, as the plaintiff now claims as against her grantee, a trust estate of apparently so little value as an undivided sixth interest in the eighty acres of land in question, it is not important to consider. The plaintiff's trouble is that, in the absence of an express trust created in the real estate in writing, he must rely upon a resulting trust, and under no pretense could such trust exist, except by the use of his father's money in the purchase of the land. But, as we have seen, the money used was Deborah's, the consideration for it having been furnished by her, and her alone.

We ought, perhaps, in this connection, to notice a position taken by the plaintiff, and that is that the Indiana land, by reason of the fact that the testator directed it to be sold, and the proceeds divided, is to be treated as personalty. He cites for the support of his position *Rumsey v. Durham*, 5 Ind., 71. But the rule enunciated has, we think, no application to the question before us. Where under a will realty is to take one direc-

2. ESTATES of
decendants:
realty treated
as personalty.

tion and personalty another, it may be that land directed to be sold is to be regarded as personalty, in the sense that the proceeds of it, when sold, are to take the direction of personalty. But, in the case at bar, however we might for certain purposes denominate the land directed to be sold, the fact remains that Amos' interest attached to the land at the death of the testator, and was not divested until he parted with it by his own act, which fact is inconsistent with the idea that he acquired an interest in the money paid long before by Deborah for the land in question. If Amos parted with his interest upon the supposition that in consideration thereof he was to have an interest in the Guthrie county land, he should have demanded a deed, or, if the legal title was to remain in Deborah, he should have demanded a writing, by which alone his trust estate can be evidenced. The plaintiff has been obliged to predicate his case upon the existence of a resulting trust, and we have to say that we think that his petition does not show it. We think that the demurrer should have been sustained.

REVERSED.

68	272
78	677
62	273
95	152
62	272
101	520
62	273
105	152
62	272
115	586
115	628

THE STATE INS. CO. v. GRANGER ET AL.

- 1. Original Notice: SERVICE UPON AGENT OF CORPORATION: STATUTE CONSTRUED.** While section 2613 of the Code provides that, "where a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of, or connected with, the business of such office or agency," *held* that this statute does not warrant the service of the notice upon one agent, in an action growing out of the business of another and former agent, who conducted a different office in the same town; and that a notice so served did not give the court jurisdiction over the principal.

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2. **New Trial: PETITION FOR: MERITORIOUS DEFENSE.** Where a petition for a new trial states facts which, if true, constitute a meritorious defense to the cause in which the new trial is asked, a new trial should not be denied simply because the evidence is not conclusive as to the facts. It is the province of the jury on the new trial to determine the weight of the evidence.

Appeal from Story District Court.

FRIDAY, DECEMBER 7.

THE petition states, in substance, that the defendant, Granger, recovered a judgment against the plaintiff on a policy of insurance, and that no notice of the pendency of the action was served on plaintiff, who has a meritorious defense to said action. The relief asked is that the judgment be set aside, and that plaintiff may have a new trial of said action, as the statute provides.

The court found for the defendant and dismissed the petition. The plaintiff appeals.

Wright, Cummins & Wright, for appellants.

W. E. Miller and Martin & Sellers, for appellees.

SEEVERS, J.—On May 15th, 1880, one Shaffer was the plaintiff's agent at Colo, Story county. He took an application on that day from the defendant, Granger, and forwarded the same to the plaintiff at Des Moines, who issued a policy of insurance thereon, on which the judgment was recovered which the plaintiff asks to have set aside. Shaffer was a soliciting agent only, and he continued to act in that capacity until after the 15th day of September, 1880. In fact, Shaffer continued to act as such agent until in the "spring of 1881."

On the 15th day of September, 1880, D. F. Bishop was appointed by plaintiff as its soliciting and recording agent at Colo. A recording agent has power to issue policies, but a soliciting agent has not. In August, 1881, an action on

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1. ORIGINAL
notice: ser-
vice on agent
of corpora-
tion: statute
construed.

the policy was commenced in Story county, and the original notice thereof was served on Bishop as the plaintiff's agent. No other service was made. No appearance was made to the action by the plaintiff, and a judgment was rendered against it for the amount of the policy.

The plaintiff is a resident of Polk county, but, as the loss occurred in Story county, the district court of that county had jurisdiction of the subject matter. Code, § 2584.

The only question to be determined, therefore, is whether the court obtained jurisdiction over the plaintiff by the service of notice on Bishop.

I. The Code provides that in suits against corporations service may be made on any agent employed in the general management of its business. § 2612. It is not claimed that Bishop was such an agent.

Section 2613 of the Code is as follows: "Where a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

It will be observed that the service must be made on some one "employed in such office or agency, in all actions growing out of, or connected with, the business of *that* office or agency." As we understand, service could be made on Bishop, and the plaintiff bound thereby, in all actions growing out of or connected with his (*that*) office or agency. Beyond this the statute does not go. Suppose there were two agents or agencies in the same county, legal service could not be made on any person employed in one office or agency, when the business out of which the action grew was transacted in the other office or agency. Again, suppose an agent is removed, or ceases to act, and the agency is for a time closed, and afterward another agent is appointed, and thereafter there is such an office or agency, can a person employed in the

latter be legally served with notice in an action growing out of business done by the former agent, and would the principal be bound thereby? We think not. The action must have grown out of, or been connected with, the business or agency in which the person served is employed. The reason for this is obvious. The statutory thought is that, if service on the principal is dispensed with, it should be made upon some one connected with the business out of which it grew. And this is reasonable. Such a person would be much more likely to inform his principal of the pendency of the action than one who knew nothing about the business, and was not interested therein. In the case before us, for a time at least, both Shaffer and Bishop were acting as agents for the plaintiff. Both, therefore, had an office or agency. Now, suppose the notice had been served on Bishop while Shaffer was still acting, could it be said that Bishop was employed in the office or agency of Shaffer? Clearly not, we think. There is no evidence which so tends, and the two offices or agencies were distinct and separate. Bishop had greater powers than Shaffer, because he could issue policies. Bishop had nothing to do with the application or policy of insurance on which the defendant's action was based. It was not connected with his office or agency. Nor did the action grow out of anything done by him, or by any one connected with his office or agency. As bearing on this question, see *Upton Manf. Co. v. Stuart Bros.*, 61 Iowa, 209.

The plaintiff, therefore, is not bound by the notice served on Bishop. Such a service has no more force and effect than if made on a stranger. It is not a defective service, but must be regarded as no service. There cannot be any great hardship if a party is required to serve the principal, or some agent, or other person, as provided by statute.

It was held in *Newcomb v. Dewey*, 27 Iowa, 381, that, if the defendant in an action did not have notice of the pendency thereof as required and prescribed by statute, the judgment obtained by default should be set aside in a proceeding

The State Ins. Co. v. Granger et al.

of this character. Following that case, the judgment in controversy in this action must be set aside.

II. Counsel for the appellee insist that the plaintiff had knowledge of the pendency of the action, and therefore is now estopped from insisting that it is invalid for want of notice. But we think the clear preponderance of the competent evidence is that the plaintiff did not have any knowledge of the action until after the judgment was rendered.

III. It is also insisted that the plaintiff has failed to show that it has a meritorious defense to the action on the policy.

One of the defenses relied on is that, by the terms of the policy, it was to be void if the incumbrances on the property were not truly stated in the policy. As we understand, it is conceded that the amount of incumbrances is not truly stated in the application; but it is claimed that the plaintiff's agent, who filled up the application, was notified of the incumbrances, and that he failed to state the same in the application. Conceding this to be so, we think the plaintiff is entitled to have the question determined by a jury. Nor are we prepared to say that the evidence is so clear as to leave no doubt which theory is correct. Indeed, we think it would be improper to express an opinion as to the weight of the evidence contained in the record supporting the defense. *Bowen v. Troy Mill Co.*, 31 Iowa, 460.

The judgment of the district court is

REVERSED.

THE EQUITABLE LIFE INS. CO. V. GLEASON ET AL.

1. **Homestead: MORTGAGE OF WITH OTHER LANDS: ORDER OF SALE ON FORECLOSURE: STATUTE CONSTRUED.** Where real estate, including the homestead, is mortgaged to A., and afterwards the same real estate, except the homestead, is mortgaged to B., upon the foreclosure of the first mortgage, B. cannot insist that the homestead be first sold to satisfy A's claim, but the mortgagor may insist that the property, other than the homestead, included in A's mortgage be first exhausted, before the homestead is exposed to sale thereunder. Code, § 1993. *Dilger v. Palmer*, 60 Iowa, 117, distinguished.

Appeal from Polk Circuit Court.

SATURDAY, DECEMBER 8.

ACTION to foreclose a mortgage. The plaintiff is content with the relief granted, but the defendant, Gleason, is not, and appeals. His co-defendant, W. T. Laughlin, is the real party in interest adverse to Gleason.

W. Kennedy and Wright, Cummins & Wright, for appellants.

Nourse & Kauffman, for Laughlin.

SEEVERS, J.—The defendants, Gleason and his wife, executed a mortgage to the plaintiff on one hundred and sixty acres of land. This action was brought to foreclose such mortgage. Sellards & Laughlin were made defendants, it being alleged that they had some claim on the land junior to the plaintiff's mortgage. Gleason set up that he was entitled to a homestead in the mortgaged premises, and he asked that the land other than the homestead be first sold. That he is entitled to the relief asked must be conceded, unless the facts pleaded and established by Sellards & Laughlin bar such right. After the execution of the plaintiff's mortgage, Gleason executed to Sellards & Laughlin a mortgage on the land described in plaintiff's mortgage, except the homestead. This

mortgage contained covenants of warranty, and was foreclosed, and the premises therein described sold on execution and conveyed by the sheriff to Sellards & Laughlin. The defendant, Laughlin, insists that the homestead must be first sold to satisfy the plaintiff's mortgage, and Gleason insists that it should be sold last. The statute provides: "The homestead may be sold for debts created by written contract executed by the persons having power to convey, and expressly stipulating that the homestead is liable therefor, but it shall not in such cases be sold except to supply the deficiency remaining after exhausting the other property pledged for the payment of the debt in the same written instrument." Code, § 1993.

In *Dilger v. Palmer*, 60 Iowa, 117, it was held, when real estate including the homestead is mortgaged, and that portion other than the homestead is voluntarily sold and conveyed by warrantee deed by the mortgagor, that the latter cannot insist that the property so conveyed shall be first sold to satisfy the mortgage. In such case it was held that the homestead must be sold first.

We are now asked to go a step further, and hold, when the second mortgage is foreclosed, and the property other than the homestead sold under a special execution and conveyed to the purchaser, that the homestead must be first sold to satisfy the prior mortgage. If this step is taken, we can logically be asked to go still further, and hold, when the mortgaged property other than the homestead is sold under a general execution against the mortgagor and conveyed to the purchaser, that upon the foreclosure of the mortgage the homestead must be first sold to satisfy the mortgage. To so hold would be equivalent to ignoring the statute. It would in fact be judicial legislation.

Where the mortgagor voluntarily sells and conveys a portion of the mortgaged premises, it should be conclusively presumed that he received the full value of the land conveyed; and in *Dilger v. Palmer* it was thought in such case that it would be inequitable and unjust to allow him to insist that

the land so conveyed should be first sold to pay the mortgage. It was thought that no such case was contemplated by the general assembly in the enactment of the statute. It is true that, for some purposes, a mortgage is regarded as a conveyance, but its ordinary purpose is the creation of a lien for the purpose of or as security for a pecuniary obligation. No presumption arises that the property is mortgaged to the full value; nor can the presumption be indulged that property sold at sheriff's sale brings its full value. The presumption, we apprehend, is that it does not. Hence, the right of redemption as to real property is given to both the debtor and judgment or lien creditors.

The conveyance in *Dilger v. Palmer* was the voluntary act of the mortgagor. In the case before us, the conveyance is the legal result of the mortgage, and, while it may be said to be the involuntary act of the mortgagor, yet, without doubt, the foreclosure sale and conveyance were made against his wish or desire. If the judgment of the circuit court is sustained, then Gleason will be deprived of his homestead, not by his voluntary act or conveyance, but by operation of law. We are not disposed to so hold. There is no case to which our attention has been called which, as we understand, is like the case a bar, for it is conceded that, if there had been no foreclosure and sale under the second mortgage, Gleason would clearly be entitled to the relief asked.

REVERSED.

Stubbs v. The Clarinda, College Springs & Southwestern Railway Company.

62 281
91 596**STURBS V. THE CLARINDA, COLLEGE SPRINGS & SOUTHWESTERN
RAILWAY COMPANY.**

- 1. Mechanic's Lien: PETITION FOR FORECLOSURE OF: PLEADING.** A petition for the foreclosure of a mechanic's lien is fatally defective, which fails to state that something was due for the services on which the lien was founded at the time the action was begun. A statement for a lien, which is attached to the petition as an exhibit, but which was made out and filed some months before the beginning of the action, and in which it is alleged that something was due when the statement was made, cannot supply the place of an averment that something was due when the action was begun.

Appeal from Page District Court

SATURDAY, DECEMBER 8.

THE plaintiff files a petition in substance alleging that, on the first day of September, 1881, he made a verbal contract with the firm of Jesse Stubbs & Co., who were sub-contractors under John Fitzgerald, who was the principal contractor with the defendant in building its line of railway, to render personal services to them in the prosecution of the work of building said company's line, as their book-keeper, cashier and general superintendent of the working force employed by said Jesse Stubbs & Co. on said railroad, and that, in pursuance of said contract, he rendered such personal services for the period of seven months, ending March 21, 1882, for which he was to receive \$100 per month and his personal expenses. That plaintiff filed in the clerk's office of the district court of Page county a just and true account of his claim, duly verified, on the first day of April, 1882, claiming a mechanic's lien on said railway. That within thirty days after said work was done and said claim was filed, defendant was duly notified thereof in writing, and was commanded to make no payments to any contractor prejudicial to the rights of plaintiff. Plaintiff demands judgment for \$547.33, and that his lien be established and enforced against defendant's line of railway.

 Gustafson v. Wind et al.

The defendant filed a general demurrer to the petition, which the court sustained. The plaintiff appeals.

McPherrin Bros., for appellant.

W. W. Morsman and Hepburn & Thummel, for appellee.

DAY, CH. J.—There is one defect in the petition which is fatal to it, and which obviates the necessity of considering the other objections urged. The petition does not state that anything is due the plaintiff from his immediate employers, Jesse Stubbs & Co. It is true, the statement for a lien, which is attached to the petition as an exhibit, alleges that there is due the plaintiff \$547.37. But this statement for a lien was filed on the first day of April. This action was not commenced until the first day of September following. This statement in the claim for a lien cannot have the effect of an averment that there was something due when the action was commenced. Without an averment that there was something due from Jesse Stubbs & Co. to the plaintiff, it is clear that the petition does not state facts entitling the plaintiff to any relief. See *Roberts v. Campbell*, 59 Iowa, 675. The demurrer to the petition was properly sustained.

AFFIRMED.

GUSTAFSON V. WIND ET AL.

1. **Intoxicating Liquors: UNLAWFUL SALE OF TO HUSBAND: ACTION BY WIFE FOR DAMAGES: PLEADING: EVIDENCE.** In an action by a woman for damages occasioned by the unlawful sale of intoxicating liquors to her husband, where the owner of the saloon building was not made a party, and it was not sought to create a lien upon the building for the damages, a description of the saloon property in the petition was mere surplusage, and plaintiff was not limited to the proof of damages occasioned by sales made in the building so described.
2. ———: ———: ———: **EVIDENCE.** In consideration of the defense made in this case, evidence of sales made more than two years prior to the beginning of the action was properly admitted as rebutting testimony.

3. **Exemplary Damages:** NO AVERMENT FOR NECESSARY IN PLEADING. Exemplary damages are not the subject of a claim in the sense that it is necessary to make an averment thereof in the petition; but such damages may always, in a proper case, be allowed by the jury without any such averment.

Appeal from Wapello District Court.

SATURDAY, DECEMBER 8.

ACTION to recover damages of the defendants for alleged unlawful sales of intoxicating liquors to plaintiff's husband, by reason of which plaintiff was injured in her person, property and means of support. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendants appeal.

Stiles & Beaman and W. W. Cory, for appellant.

Moore & Steck, for appellee.

ROTHROCK, J.—I. The petition was filed on the 25th day of July, 1882, and it was alleged therein that the defendants had for two years prior to that time unlawfully sold liquors to plaintiff's husband. One J. H. Whitney was named in the petition as a defendant, and it was alleged that he was the owner of the building where the other defendants kept and sold liquors, and that such sales were made with his knowledge and consent, and the property of Whitney was described as being on Second street, between Court and Market streets, in the city of Ottumwa. It does not appear that Whitney was served with notice of the action. He made no defense, and the cause was tried as against the other defendants without any reference to establishing a lien against the saloon property. It appeared on the trial that the defendants had not sold liquors in the building owned by Whitney for two years, but that for part of that time they had been engaged in that business on the corner of Market and Second streets,

1. INTOXICATING liquors: unlawful sale of to husband: action by wife: pleading: evidence.

Gustafson v. Wind et al.

in Ottumwa. The court permitted the plaintiff to prove sales of liquors by the defendants to the plaintiff's husband at the place last above named. The defendants objected to this evidence, and they asked the court to instruct the jury that "under the issues plaintiff, if entitled to recover, would be limited to injuries produced by the sale of liquors sold at the premises described in the petition, and alleged to belong to J. H. Whitney." The court refused to give this instruction. It is urged by counsel for defendant that this ruling of the court was erroneous.

There might be good ground for objection to this evidence if Whitney had been made a party to the action, and if it had been sought to charge his property with any damages which might be recovered of the other defendants. But, as Whitney was not a party, the description of the saloon property was wholly immaterial, and surplusage. The defendants were liable for damages for liquors sold to plaintiff's husband, without regard to any particular building. Besides, the record does not show that the defendants were taken by surprise by the evidence complained of, and the variation between the allegation and the proof is not such as seems to us to have been material, in view of the fact that the allegation itself was wholly immaterial.

II. It appears that the court also permitted the plaintiff to prove sales made by the defendant at times prior to two ^{2. —: —:} years before the commencement of the suit, and ^{—: evi-} ^{dence.} this is made the ground of complaint upon the part of appellants. The bill of exceptions does not contain all the evidence. And it does not appear therefrom in what connection or at what stage of the trial this evidence was introduced. The defendants in their answer averred that plaintiff's husband had "been a confirmed toper for years; that long before these defendants engaged in business, which was recently, he was in that condition, and had been for a long time before, and that such condition was in no manner created by any act of defendants." It is to be

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presumed that the defendants supported this allegation by proof, and thereby sought to show that they should not be held responsible for making a drunkard of plaintiff's husband. In rebutting this, it would be competent to show that defendants were not blameless, as they alleged, but that sales were made by them even more than two years before the commencement of the action. The court instructed the jury that the plaintiff could recover damages by the illegal sales of liquors to the husband within two years of the commencement of the suit. It is not claimed that the court permitted original evidence of sales prior to two years to be introduced, and, indeed, in view of the instructions, it is evident that such evidence was not introduced, and, under the issues made by the defendants as to the plaintiff's husband's previous habits, and their agency in bringing him to his besotted condition, the evidence now under consideration was competent as rebutting or impeaching evidence.

III. It was alleged in the petition that the plaintiff had been damaged in her person, property and means of support, in the sum of five thousand dollars. The jury returned a verdict of five hundred and fifty dollars. The court refused to instruct the jury at the instance of the defendants that the plaintiff was not entitled to exemplary damages, and this refusal, together with the instructions of the court to the contrary, is made the ground of complaint by appellants' counsel. It is urged that no exemplary damages can be allowed, because the plaintiff demanded no such damages in her petition. We do not think such an allegation was necessary. Exemplary damages are not the subject of a claim in the sense that it is necessary to make averment thereof in the petition. The cause of action is founded upon injury to the person, property and means of support. Where it is shown that damages have been suffered in any of these respects, it is in the discretion of the jury, in a proper case, to add to the verdict such a sum as they think proper as exemplary damages.

2. EXEMPLARY damages: no averment necessary for in pleading.

AFFIRMED.

KITTINGHAM v. THE SIOUX CITY & PACIFIC RAILWAY CO.

62	285
101	673
62	285
180	721

1. **Expert Testimony: ESTABLISHMENT OF NEGLIGENCE BY.** Where the failure to have certain work done at a certain time is the negligence complained of, it is not competent to ask a witness as an expert when the work should be done. The witness should state the results accruing from delay in having the work done, and the jury should determine whether or not the delay shown in the case on trial constituted negligence.
2. **Railroads: NEGLIGENCE IN REPAIRING CARS: EVIDENCE OF CUSTOM.** Evidence as to the time when railway companies usually replace certain portions of their machinery is immaterial, when it is not shown that the custom has any relation to the avoidance of the kind of injury complained of.
3. ———: **INJURY TO EMPLOYEE: CONTRIBUTORY NEGLIGENCE: MEANS OF KNOWLEDGE.** Where an employe of a railway company knew, or by the exercise of reasonable care could have known, of the company's negligence, whereby he claims to have been injured, and of which he complains, he was guilty of contributory negligence in incurring the danger, and he cannot recover for the injury so sustained.
4. ———: ———: **EVIDENCE: INSTRUCTION.** Where the evidence tended strongly to show that the injury complained of was the result, not of defendant's negligence, but of an ordinary cut, aggravated by a depraved condition of plaintiff's system, the court properly instructed that plaintiff could not recover, if the jury found that plaintiff's injury occurred by reason of the impurity of his blood.
5. ———: **NEGLIGENCE: MEANS OF KNOWLEDGE.** Where nothing has ever occurred to suggest to a railway company that there is any danger in a certain line of conduct, the company cannot be said to have had such means of knowledge of the alleged danger as to render it negligent in continuing in that line.
6. **Instruction: CORRECT IN LAW BUT WRONG IN APPLICATION.** An instruction which properly states the law, but which plaintiff claims was not applicable to the theory of his case, could work no prejudice to him, and is no ground of reversal on his appeal.

Appeal from Woodbury District Court.

SATURDAY, DECEMBER 8.

THE plaintiff alleges in his petition, in substance, that he was in the employment of defendant, performing the duties

Kitteringham v. The Sioux City & Pacific Railway Co.

of a helper in its machine shops, and that he was instructed by the defendant's master mechanic to remove the old brasses belonging to the boxing of certain car wheels and axles, which were covered over with poisoned grease, and that plaintiff was dangerously poisoned by the handling of such brasses, necessitating the amputation of the middle finger of his left hand, and resulting in the loss of the use of his left arm and hand. The plaintiff prays judgment in the sum of \$5,000. There was a jury trial, resulting in a verdict and judgment for the defendant. The plaintiff appeals.

Burnham, Hudson & S. H. Cochran, for appellant.

Joy & Wright, for appellee.

DAY, CH. J.—I. The plaintiff introduced as a witness one John McKenzie, who testified that he repairs cars for a living, and had about seven years experience in greasing cars, but quit it about seven years ago, and that he is not now employed by the company, and has not been for some time, and that he knows about the substance formed on the boxing of car wheels, but does not know of any poisonous substance that is ever formed on the brasses of the boxes of the car wheels. The witness was then asked this question: "When ought they to be removed?" This question was objected to as incompetent and immaterial, and upon the ground that it is not shown that the witness is competent to judge. The objection was sustained, and this action is assigned as error. Appellant insists that "this question was propounded to show that the brasses should always be removed before they are worn as thin as a knife, before they become broken, or before the old axle grease burns into the broken brass, and thereby causes a poisonous substance, which failure to remove would constitute the elements of negligence." We think, however, that the proposed fact is not competent to be established by the opinion of a witness offered as an expert.

1. EXPERT
testimony:
establish-
ment of neg-
ligence by.

The effects of allowing the brasses to become worn thin and broken should be shown. Then the jury would be competent to determine whether it was negligence to fail to remove them before such condition existed. To allow a witness to testify as an expert to such fact, would be to substitute the witness for the jury.

II. This same witness further testified that he knew the custom of railroads in removing these old brasses. He was then asked the following question: "What is the custom in reference to the time when they should be removed—before they get so they break, or afterward?" This question was objected to, and the objection was sustained. The custom of railroads as to the removal of the brasses before they break is not material. They might remove them before they become so thin as to break, for the purpose of preventing injury to the axles, or accidents to the train. The real question in this case is, do the brasses accumulate a poisonous substance if not removed before they become so thin as to break? The custom of railroads as to the time of removal could throw no light upon this question.

III. The appellant complains of the giving of the third instruction, as follows: "The main questions for you to determine herein, and to which your attention is directed, are as follows: 1. Was the plaintiff directed to go and remove, and did he go and remove, the brasses from the car wheels at River Sioux, in obedience to a direction of the master mechanic? 2. Were the brasses so removed, at the time of removal, poisonous? 3. If they were poisonous, then did the defendant, through its officers, whose duty it was to keep the cars in repair, have knowledge that the same were poisonous, or would said officers by the exercise of ordinary care have had such knowledge? 4. If the brasses were poisonous, then did plaintiff have knowledge that they were poisonous, or would he by the exercise of reasonable care have had such

2. RAILROADS:
negligence in
repairing
cars: evi-
dence of cus-
tom.

3. ———: inju-
ry to em-
ploye: con-
tributory neg-
ligence:
means of
knowledge.

 Kitteringham v. The Sioux City & Pacific Railway Co.

knowledge? 5. If plaintiff was injured, then did his injury occur by reason of the impurity of plaintiff's blood? If you answer the first, second and third questions in the negative, then there can be no recovery for plaintiff. If you answer the fourth in the affirmative, there can be no recovery. If the fifth is answered in the affirmative, there can be no recovery." Appellant insists that the fourth division of this instruction is erroneous, in that it holds that, if the employee could have, by ordinary care, discovered the poisonous condition of the brasses, he cannot recover. Appellant also insists that the fourth instruction of the court is erroneous, which in substance directs the jury that plaintiff cannot recover if he knew, or by the exercise of that care with respect thereto which a reasonable man, under the same circumstances, would have exercised, could have known, that the brasses were poisonous. In support of this objection, appellant relies upon *Muldowney v. Illinois Central Railway Co.*, 36 Iowa, 462. The doctrine of this case was limited and explained in *Way v. Illinois Central Railway Co.*, 40 Iowa, 341. See also *Muldowney v. Illinois Central Railway Co.*, 39 Id., 615; *Money v. The Lower Vein Coal Co.*, 55 Id., 671. The instructions, in the matter complained of, are not erroneous.

Appellant also complains of the fifth sub-division of the third instruction. The evidence very strongly tended to show that the injury to plaintiff did not result from any poisonous condition of the brasses, and to raise a strong presumption that it arose solely from an ordinary cut, in connection with a depraved condition of the plaintiff's system. The evidence strongly preponderates against the view that any poisonous substance accumulates upon the brasses before they are removed from the axles. No instance of poisoning from the brasses was shown, although the witnesses testified to the receiving of frequent cuts in the removal of the brasses. The injury to plaintiff, which was a small cut upon the finger, was inflicted

4. —: —: evidence: instruction.

on Sunday. The finger did not become inflamed until Tuesday. The plaintiff claims that his finger was poisoned by verdigris on the brasses. The testimony of experts is that, if verdigris is applied to a flesh wound, its action would be immediate, and that if the wound was made upon the finger, and it did not become inflamed for two days, the verdigris had nothing to do with it. The jury were fully authorized to find from the testimony that the injury to plaintiff did not at all result from any poisonous condition of the brasses. The instruction complained of was both pertinent to the evidence and proper. The twelfth instruction of the court is to the same effect as the fifth sub-division of the third instruction, and, for the reasons already assigned, is proper.

IV. Appellant complains of an instruction given at the request of defendant, as follows: "The jury are instructed

5. ———: neg- that the uncontrovertible testimony in the case
ligence: discloses that defendant and its employes had no
means of knowledge. knowledge of the existence of any poisonous substance on the said brasses in question, at the time of said injury; and if, from the experience of defendant and its employes, as disclosed by the evidence, they had no cause or reason to believe that there was any poisonous substance on said brasses, there can be no recovery in this action." It is said that this instruction assumes that the railroad company must possess actual knowledge, when the law only requires means of knowledge, and also assumes that the experience of a railroad company will excuse any negligence that it may be guilty of. The instruction is not vulnerable to the criticism made. As already stated, the evidence strongly preponderates against the view that any poisonous matter accumulates upon the brasses before their removal from the axles. If nothing had ever occurred in the experience of defendant to suggest the existence of such poisonous accumulation, it did not possess such knowledge as would render it negligent in not discovering the existence of poisonous matter on the brasses in question.

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V. Appellant assigns as error the giving of the following instructions: "In determining whether the defendant was negligent, you must consider the light and knowledge the defendant had at the time of the alleged injury; and if at that time it had no knowledge that there was any poisonous substance on the brasses in question, and by the exercise of ordinary care would not have had such information; and if there had been no injurious substance in the use of such brasses prior to said alleged injury in the operation of defendant's railroad, then the defendant was not negligent." This instruction is clearly correct. Surely, the defendant was not negligent, if there had existed no injurious substance in the prior use of the brasses, and the defendant did not know, and by the exercise of ordinary care would not have known, that there was any poisonous substance on the brasses in question.

VI. Appellant assigns as error the giving of an instruction to the effect that the plaintiff cannot recover through or by reason of any negligence on the part of a co-employee of plaintiff, if the injury was not occasioned while the plaintiff was engaged in the operation of defendant's road, or in a manner connected with the operations of the road. It is not claimed that the instruction is in itself erroneous, but that it had no application to the case, because the action was not based upon the statute, but upon the theory of the master's liability to the servant. If this be true, the giving of the instruction could have worked no prejudice.

VII. The appellant complains of the giving of the following instruction: "If the jury find from the testimony that defendant used upon its cars the same kind of oil that was generally used upon the cars of railroad companies at the time of said alleged injury, and had no knowledge, and, by the exercise of ordinary care, would not have obtained any knowledge, that there was any poisonous substance on the brasses in question,

6. INSTRUCTION: correct in law but wrong in application.

7. RAILROADS: negligence: means of knowledge.

Houston, Adm'r, v. Lane et al., Ex'rs.

then the plaintiff cannot recover." There is nothing whatever in the evidence to show that the oil used by defendant was impure, or that it might not be properly used. Appellant claims, however, that from this instruction the jury may have presumed that, if the oil used was not of itself poisonous, the company was not responsible. It is clear that this construction cannot properly be placed upon the instruction. The defendant's immunity is expressly made to depend upon its want of knowledge, or of the means of knowledge, in the exercise of ordinary care, that there was any poisonous substance upon the brasses. The instructions asked, so far as applicable and proper, are covered by the instructions of the court. The record discloses no error.

AFFIRMED.

HOUSTON, ADM'R, v. LANE ET AL., EX'RS.

1. **Will:** ACCEPTANCE OF TERMS OF BY SURVIVING SPOUSE: STATUTE STRICTLY FOLLOWED. Under § § 2440 and 2452 of the Code, the interest of the surviving husband or wife in the estate of the deceased spouse is not affected by a will, unless consent thereto is entered of record within six months after notice of the provisions of the will. Consent and acceptance are not sufficient without the record entry; and the record cannot be made after the expiration of the six months. *Baldozier v. Haynes*, 57 Iowa, 683, followed. In this case, the executors of the deceased wife sought to have the consent of the husband entered after his death, as against his administrator.

62	291
87	195
62	291
114	712
62	291
115	300
62	291
120	451
62	291
137	385

Appeal from Des Moines Circuit Court.

SATURDAY, DECEMBER 8.

A MOTION was made by defendants in the court below, sitting as a court of probate, in the matter of the estate of Sophia H. Warren, deceased, that an entry be made of record of the consent of the husband of the testator to take under the will. The motion was sustained; and plaintiffs appeal.

P. Henry Smyth & Son, for appellant.

B. J. Hall, for appellees.

BECK, J.—I. The plaintiff is the administrator of the estate of Fitz Henry Warren, deceased, and the defendants are the executors of the will of his wife, Sophia H. Warren, deceased. On the 21st day of May, 1877, the will of Mrs. Warren was admitted to probate in the court below. It is in the following language.

"I, Sophia H. Warren, wife of Fitz Henry Warren, of Burlington, Iowa, do make and publish this my last will.

"1. I appoint C. C. Warren and George H. Lane executors without bond.

"2. After my debts are paid, I direct that one-third of my estate, real, personal or mixed, be held, invested and managed by my executors for the benefit of my husband, and that they semi-annually pay to him the income thereof during his natural life. If the income should prove insufficient for his comfortable support, then they are authorized to apply such part of the principal as may be necessary for that purpose. At my husband's death, such property as shall remain shall be equally divided between my son, Francis, and daughter, Lilly.

"3. One-third of said rest, residue and remainder of my estate I give, devise and bequeath to my son, Francis J. Warren; provided, however, and this bequest is upon the following condition: That said bequest shall not be paid to him until he attain the age of thirty years, but in the meantime shall be invested and managed by my said executors, and the income paid to him semi-annually, &c.

"4. The other and remaining third of said residue and remainder I give, devise and bequeath to my daughter, Lilly Johnson Warren, subject to the following conditions and limitations, viz: That the same shall not be paid her until she is twenty-five years of age; in the meantime the same shall

Houston, Adm'r. v. Lane et al., Ex'rs.

be held, invested and managed by my said executors, and the income thereof paid to her semi-annually until she is twenty-five years of age as aforesaid.

“5. In order to enable my said executors the more effectually to carry out the several provisions of this my will, I do hereby give them full power and authority to sell any property left by me, and convey the same, whether real, personal or mixed, as fully as I could do, if living, and to invest the same, and the same again to sell, convey and invest, without limit or restraint. And in case of the decease of my executors, or their non-acceptance of or removal from said trust, I direct that their successors, to be appointed by the probate or other court having jurisdiction thereof, shall have the same power of disposal and investment of the real and personal estate, and the same duties in relation to the trusts herein established, as my executors have in and by this will.”

The defendants are executors under the will.

General Fitz Henry Warren died, June 21, 1878, and the plaintiff was duly appointed administrator of his estate.

No consent of General Warren to take under the will of his wife was made of record in the court below, as required by Code, § 2452, prior to the order appealed from in this case. On the 18th day of May, 1882, the defendants moved the court below to cause to be entered of record such consent. The motion was sustained and the record was accordingly made on that day.

There was evidence showing that Gen'l Warren had full knowledge, from the first of the provisions of the will, and, indeed, that it was framed to accord with his suggestions, and that he received from the executors payments under the will, and transferred to his daughter by written assignment all his right to the sums of money to be paid him by the executors under the will. Upon this proof, and without evidence of any formal assent by Gen'l Warren, either written or oral, made in court, or any showing that any such order had been directed but had not been entered of record, the

Houston, Adm'r, v. Lane et al., Ex'rs.

court below entered the order complained of by plaintiff. It will be observed that it is not a case of a *nunc pro tunc* entry upon the record.

II. Code, § 2452, provides that "the widow's share [of the estate of her deceased husband] cannot be affected by any will of her husband, unless she consents thereto within six months after notice to her of the provisions of the will by the other parties interested in the estate, which consent shall be entered upon the proper record of the circuit court." This provision is applicable to the surviving husband of a deceased wife. Code, § 2440.

It will be observed that the interest of a surviving husband or wife in the estate of the deceased spouse is not affected by a will, unless consent thereto is entered of record within six months after notice of the provisions of the will. It is not claimed that record of such consent was made in this case at any time during the life of General Warren. More than six months transpired after his death before the order appealed from in this case was made. If it be conceded that he had the notice required by the statute, and consented, a point we do not determine, the record was not made within the time prescribed by the statute above quoted, which we have held to be essential in order to defeat the rights of the surviving spouse. See *Baldozier v. Haynes*, 57 Iowa, 683.

This decision is decisive of the case before us. It is, however, questioned by defendant's counsel. We think it accords with the plain language of the statute. Indeed, no other conclusion could be reached which would not be in conflict therewith. With the wisdom of the statute, or its policy, we have nothing to do. It in unmistakable words prescribes that, in the absence of a record of consent to the will made within six months of notice of its provisions, the survivor's rights are not affected thereby. *Ita lex scripta*. We cannot nullify or change it by interpretation.

III. It is urged that Gen'l Warren did consent to the will in his lifetime. But consent alone does not defeat his

Bundy v. Dare.

rights under the provisions of the statute above quoted. They are not defeated, unless a record be made of that consent. It is argued that, if no notice be given, the consent may be entered of record at any time, and is not restricted to the six months named in the statute. To so hold would be the cause of uncertainty in the settlement of estates, and would result in loss and injustice to innocent parties.

Other arguments are pressed with zeal by counsel for plaintiff. They are mainly based upon the effect of the law, considerations based upon a comparison of the statute with prior enactments upon the same subject, and the like. While they are not without force, they fail to convince us that the case is not within the rule of *Baldozier v. Haynes*, or to satisfy us that our decision in that case is not correct. In our opinion the decision of the circuit court ought to be

REVERSED.

BUNDY V. DARE.

62	295
141	404

1. **Contract for Sale of Land:** COMPLIANCE NECESSARY TO CONSUMMATE. Where defendant proposed to sell certain land to plaintiff for a price named, provided plaintiff sent \$300, and paid \$100 nearly due on a mortgage, and the plaintiff accepted the terms, but did not pay as required, *held* that the contract was not consummated, and that plaintiff could not afterward recover of defendant for his refusal to convey the land.

Appeal from Taylor District Court.

SATURDAY, DECEMBER 8.

ACTION to recover damages caused by the failure of the defendant to convey certain real estate to the plaintiff, which the latter claims the defendant agreed to convey to him. The cause was referred, and the referee found for the defend-

ant, and his report was confirmed by the court, and plaintiff appeals.

J. L. Brown and L. Evans, for appellant.

G. L. Finn, for appellee.

SEEVERS, J.—This is an action at law, and the only question to be determined is, whether the referee erred in finding that the terms upon which the plaintiff agreed to sell the land had been accepted and complied with by the defendant.

The plaintiff wrote the defendant, proposing to purchase the land. The defendant, in reply, proposed to sell for \$1,400—the purchaser to assume a mortgage for \$1,000—and then proceeded to say: “Send me three hundred dollars, and pay the interest which is due April 1st, 1881.”

The plaintiff accepted this offer, but he did not send or pay the \$300, or pay the interest. Afterward, there was some controversy as to the kind of a deed the plaintiff was to execute, and whether or not the mortgage was to be assumed by the plaintiff, or discharged by the giving of a new note and mortgage. There is also some controversy as to whether one Cushman was the defendant’s agent, and authorized by him to accept the money agreed to be paid. It will be conceded that Cushman was such agent.

The plaintiff paid Cushman \$100 for the defendant, and a deed was sent the defendant to be executed by him. Before the deed reached him, he had sold the land to another party, and he refused to execute the deed.

The defendant proposed to sell the land for a named price, provided \$300 was sent, and there was paid \$100 interest nearly due on the mortgage. The plaintiff accepted this proposition, but did not comply with it. He did not pay or offer to pay the \$300 and interest.

The defendant’s proposition was: “Send me \$300 and pay the interest.” This did not become a contract until the money was paid. Possibly it might have been paid to Cush-

Okerson v. Crittenden.

man, but this was not done. Mere readiness to pay is not sufficient. The plaintiff did not do all he was required to do. He was required to send the money to the defendant, or, at least, to pay it to Cushman as defendant's agent. Until he did this, defendant was not bound. We think the referee found correctly, and that the court did not err in confirming his report.

AFFIRMED.

OKERSON V. CRITTENDEN.

1. **Wager:** LIABILITY OF STAKEHOLDER TO LOSING PARTY. Where the parties to a wager have agreed that the stakeholder shall determine who has won the wager, and pay the stakes to the winning party, the stakeholder may rely upon the agreement, and pay the stakes to the party in whose favor he decides, unless, before the payment is made, the losing party renounce the wager and demand his money; but a demand of the stakes, on the ground that he has won the wager, is not a repudiation of the wager, and will not render the stakeholder liable for payment to the other party.

Appeal from Montgomery Circuit Court.

SATURDAY, DECEMBER 8.

PLAINTIFF and another person made a wager. The defendant was stakeholder, and the plaintiff seeks to recover of him the amount the plaintiff deposited in his hands. Judgment was rendered for the defendant, and the plaintiff appeals.

Z. T. Fisher & Z. T. Fisher, Jr., for appellant.

C. E. Richards, for appellee.

SEEVERS, J.—I. The amount in controversy being less than one hundred dollars, two questions have been certified upon which it is said to be desirable to have the opinion of the supreme court. The questions are as follows:

62	297
106	694
62	297
133	506
62	297
141	613

"1. Can a stakeholder of money, pending the determination of a bet between two parties, who is at the same time made umpire to decide which of the parties is the winner, and to pay the money to the winning party, exonerate himself by paying over the money, without further securing the consent of the losing party to pay the same to the declared winner, upon the determination of the fact as to which party won?

"2. Whether the declaration of the party declared to be the loser, made to the stakeholder, that he is the winner of the bet, and a demand of the entire stake, is such a demand as to amount to a revocation of a bet, rendering a stakeholder liable, in paying the money to the other party thereafter?"

The defendant, as stakeholder, was to determine who had won the wager. He did so, and paid the money to the winner. Can the plaintiff recover of the defendant, is the question to be determined under the first of the above questions.

It has been held that, where the stakeholder has been notified not to pay over the wager, and he has not done so at the time he is notified, then a recovery may be had. *Shannon v. Baumer*, 10 Iowa, 210; *Thrift v. Redman*, 13 Id., 25; *Adkins v. Flemming*, 29 Id., 122.

The case before us is materially different from the foregoing; for the appellant insists, and the first of the above questions implies, that, before the stakeholder can exonerate himself from liability, he must have obtained the consent of the losing party to pay the amount wagered to the winner. We understand the rule to be: "Although the wager be illegal, if the stakeholder has paid it over to the winner before notice or demand against him by the loser, he is exonerated." 2 Parsons on Contracts, 627.

When the wager was made, both parties consented that the amount wagered should be paid to the winning party, and it was not essential that such consent should be given again. The first question must be answered in the affirmative.

Gilman v. The Sioux City & Pacific R'y Co.

II. The plaintiff, as we understand, demanded the whole amount wagered of the stakeholder, on the ground that he had won the wager. This cannot be regarded as a revocation or repudiation of the wager. Nor can it be regarded as a notice to the stakeholder not to pay the amount placed in his hands by the plaintiff. No demand was made on the stakeholder for the amount the plaintiff placed in his hands. This he was required to do before the stakeholder could be made liable.

The second question must be answered in the negative.

AFFIRMED.

GILMAN V. THE SIOUX CITY & PACIFIC R'Y CO.

1. **Practice:** TAKING CASE FROM JURY: PLEADING NOT SUSTAINED BY EVIDENCE. Where the ground of action as stated in the petition is not supported by the evidence, the court may properly take the case from the jury and dismiss the cause upon defendant's motion.
2. **Railroads:** DUTY IN REGARD TO STOCK RUNNING AT LARGE. A railroad company is under no obligation to provide places for stock to leave its track.

Appeal from Woodbury Circuit Court.

SATURDAY, DECEMBER 8.

ACTION for damages alleged to have been sustained by the plaintiff, by reason of the killing of a horse by the defendant in the operation of its road. The petition contains two counts. In the first the plaintiff claims double damages. In the second he claims single damages. A jury was called, and the plaintiff's evidence was introduced, when the defendant made a motion to dismiss the plaintiff's action, which motion the court sustained. The plaintiff appeals.

Geo. M. Pardoe and *Geo. W. Wakefield*, for appellant.

Joy & Wright, for appellee.

ADAMS, J.—I. The plaintiff, in his first count, avers that the horse was killed where the defendant had a right to fence, but had not fenced, and claims the right to recover upon this ground, though the company was not otherwise guilty of negligence. His action in this respect is predicated upon section 1289 of the Code. This section gives a right of recovery for injury to stock running at large, if injured by reason of the want of a fence. The petition contains no averment that the horse was running at large, and no express averment that he was killed by reason of the want of a fence. We find in the plaintiff's reply, however, that the horse was running at large; and from the averment in the petition that the horse was killed where the defendant had a right to fence, but had not fenced, it should be inferred, perhaps, that he was killed by reason of the want of a fence.

Whatever we might think of the sufficiency of the pleadings, we have to say that the action does not appear to have been dismissed upon the supposition that they were insufficient, but for lack of evidence, and we refer to the petition only as it may bear upon the question of evidence.

It is not easy to say precisely what the evidence shows or fails to show respecting the locality of the injury. It shows, we think, that the horse, shortly prior to the injury, was in a pasture crossed by the defendant's track, and that the track was not fenced. It shows also, we think, that the horse entered upon the track in the pasture, but was killed thirty or forty rods from where he entered upon the track, but where that was we cannot say. We infer that it was outside of the pasture. The evidence tends to show that the horse, after he entered upon the track, was driven by the approaching train northward along the track thirty or forty rods, and was not struck until he reached a point which is said to be in Floyd

City. There was also evidence tending to show that the pasture enclosed a portion of Floyd City. Whether the place where the horse was killed was in Floyd City or not, we do not deem very material. It might have been in Floyd City, but in a part not platted nor intersected by streets, and where the public had no rights which would prevent the defendant from fencing. If the place was within the tract fenced and occupied as a pasture, perhaps we ought to presume, in the absence of any evidence to the contrary, that the public had no rights that should prevent the defendant from fencing. But the plaintiff's trouble is that it is not shown that the horse was killed inside of the pasture. On the other hand, we infer that he was not. It is true that the defendant averred in his answer that the horse was killed within the pasture, but the plaintiff denied it, and he does not contend that he is entitled to the defendant's averment as an admission. His theory is very obscurely presented, but we understand it to be that the horse, though entering upon the track within the pasture, followed it by running before the engine outside of the pasture, and was struck and killed outside. He offered to show that the company failed to put in a cattle-guard; he did not offer to show that the company failed to put in a cattle guard at the point where the railroad track leaves the pasture. But we suppose that this was the point which the plaintiff had in mind, and that his theory in making the offer was that the horse was killed outside of the pasture by reason of a want of a fence inside, and by the want of a cattle guard, which allowed him to run along the track until he passed outside, where he was struck.

The defendant assigns as error the exclusion of his offered evidence in respect to a cattle guard. But we think that the court did not err in excluding it. It is only by conjecture that we can arrive at the conclusion that the place referred to is where the track leaves the pasture. Besides, conceding that that was the place meant, and that the plaintiff could have shown that for want of a fence the horse entered upon the

track in the pasture and ran before the engine, and for want of a cattle guard passed out and was struck and killed outside of the pasture, the plaintiff would not, under the allegations of his petition in the first count, be entitled to a recovery. He placed his right of recovery in this count, not upon an averment that the horse was killed by reason of a want of a fence, (the statutory ground,) but that the horse was killed where the company had a right to fence, but had not fenced.

If the plaintiff had averred that the horse was killed by reason of a want of a fence, we are not prepared to say that he might not have shown a right of recovery, by showing that the horse, by reason of a want of a fence, entered upon the track inside of the pasture, and ran ahead of the engine along the track, and, by reason of a want of a cattle guard, passed out and was struck and killed outside, even though the place was among the streets of Floyd City. But under his averment we see no evidence introduced or offered upon which he could recover.

II. In the second count, the plaintiff undertakes to plead the negligence of the company. But the facts averred, it appears to us, do not constitute negligence. The facts averred are that the track was so constructed that stock, having once entered upon it, could not when frightened and driven before an engine find a safe and convenient place to leave the track. But we do not think that a railroad company is bound to provide places for stock to leave its track. Where the company has a right to fence, such places must be deemed unnecessary, because the company must fence, in order to shield itself from liability. Where the company has no right to fence, such places would seem to invite stock upon the track, as well as afford a place of escape, and would, to say the least, be of very doubtful utility. We think that the court did not err in taking the case from the jury.

AFFIRMED.

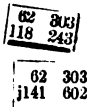
STANGE ET AL. V. THE CITY OF DUBUQUE.

1. **Constitutional Law: POWER OF LEGISLATURE TO LEGALIZE VOID ORDINANCE.** Where a city acting under special charter has passed an ordinance which is void, because not authorized by its charter, and the legislature could not grant power to the city to pass the ordinance without violating article 3, section 30, of the constitution, which inhibits local or special legislation in certain cases, *held* that the legislature could not indirectly accomplish the same result by an act validating the void ordinance, and that an act passed for that purpose was unconstitutional.
2. **Cities and Towns: RAILWAYS ON STREETS: POWER OF CITY UNDER SPECIAL CHARTER.** Under § 464 of the Code, as affected by chapter 96, laws of Eighteenth General Assembly, a city acting under a special charter has no power to authorize a railway company to use a street for railway purposes, without compensation to the owners of lots abutting upon the street.
3. **Railways on Streets: DAMAGES TO LOT OWNERS: EVIDENCE.** In an action against a city to recover damages for allowing a street to be used for railway purposes without compensation to the owners of abutting lots, evidence that by the operation of the railway travel had been diverted from the street was admissible, for the purpose of showing that the rental value of property on that street had been diminished.
4. **Error Cured by Subsequent Ruling: NO PREJUDICE.** Where the effect of an alleged error is cured by a subsequent ruling in the case, no prejudice results, and it is no ground for reversal.
5. **Practice in Supreme Court: RECORD FOLLOWED.** A position taken in argument in a law case, which does not pertain to and is not based upon any ruling of the court below, will not be considered.

Appeal from Dubuque Circuit Court.

SATURDAY, DECEMBER 8.

THIS case is a continuation of that of Stange v. Hill & West Dubuque Street Railway Company, 54 Iowa, 669. Upon the remanding of the foregoing case to the court below, the plaintiff filed an amended and substituted petition, making the city of Dubuque a party defendant, and claiming of said city damages for authorizing and permitting Julian avenue, in said city, upon which plaintiff's property abuts, to be occupied by a street railway operated by steam, to the



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plaintiff's damage. The defendant answered, denying all the allegations of the petition, and alleging, in substance, that the legislature of the state of Iowa had legalized the ordinance of the City of Dubuque, granting to said company authority to occupy said street. The plaintiff's demurrer to the affirmative portion of this answer was sustained. The cause was tried to a jury, and the trial resulted in a verdict and judgment for the plaintiff for \$675. The defendant appeals.

James H. Shields, for appellant.

Pollock & McNulty, for appellee.

DAY, CH. J.—I. The City of Dubuque, operating under a special charter, on the 28th day of April, 1877, passed an ordinance conferring upon the Hill Street and West Dubuque Street Railway Company authority to construct upon certain streets in the city, including Julian avenue, a street railway, and to operate the same with either steam or horse power. In *Stange et al. v. Hill & West Dubuque Street Railway Company*, 54 Iowa, 669, it was held, following *Stanley v. City of Davenport*, 54 Id., 463, that the city had no power to pass this ordinance. The Eighteenth General Assembly of the state of Iowa passed an act, approved March 24th, 1880, which is as follows: "That the ordinance of the city council of the city of Dubuque, passed April 28th, A. D., 1877, granting to the Hill & West Dubuque Street Railway Company right of way for its railroad on certain streets of said city, mentioned in said ordinance, be and the same is hereby validated, and made as effective in law as if said council had full power and authority to pass the same at the time said ordinance was passed." The defendant relies upon this curative statute. The plaintiff insists that it is unconstitutional. The defendant concedes that no express power is given to the city of Dubuque by its charter to authorize the occupancy of its streets by railroads operated by steam. The appellant contends that "the power of the legislature to ratify a contract

1. CONSTITUTIONAL law : power of legislature to legalize void ordinance.

entered into by a municipal corporation for a public purpose, which is *ultra vires*, results from its power to have originally authorized the very contract to be made." This proposition we concede to be correct. Could the legislature, then, have passed an act authorizing the city of Dubuque to pass the ordinance in question? Article 3, section 30, of the constitution provides: "The general assembly shall not pass local or special laws in the following cases:

"For the assessment and collection of taxes for state, county or road purposes;

"For laying out, opening and working roads or highways;

"For changing the names of persons;

"For the incorporation of cities and towns;

"For vacating roads, town plats, streets, alleys or public squares;

"For locating or changing county seats."

"In all the cases above mentioned, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." It has been held that this section of the constitution prohibits the passage of a special law for the amendment of the charter of a city. *Ex parte Pritz*, 9 Iowa, 30; *Davis & Bro. v. Woolnough*, Id., 104; *Hetherington v. Bissell*, 10 Id., 145; *Baker & Griffin v. The Steamboat Milwaukee*, 14 Id., 214; *Town of McGregor v. Baylies*, 19 Iowa, 43. As the legislature could not, by special act, have authorized the city of Dubuque to pass the ordinance in question, it follows that it cannot, after the passage of the ordinance, legalize it by a special act. The legislature cannot do indirectly what it is inhibited from doing directly.

II. Section 464 of the Code confers upon cities, acting under the general corporation law, power to authorize or forbid the laying of tracks for street railways on its streets. By chapter 96, laws of the Eighteenth General Assembly, approved March 23, 1880, this section is made applicable to cities acting

2. CITIES AND
TOWNS: RAIL-
WAYS IN
STREETS: POW-
ER OF CITY UN-
DER SPECIAL
CHARTER.

under special charters. It is claimed that, under this legislative authority, the city of Dubuque may authorize its streets to be used by a railway. But section 464 authorizes such use of the streets only upon payment of the damages to the property owners. The ordinance in question does not require such payment, nor make the authority to occupy the street conditional upon making such payment. Section 464 of the Code does not, we think, affect the rights of these parties.

III. The defendant complains that the plaintiffs were allowed to prove that the operation of the motor had diverted travel from the street. This was done simply for the purpose of showing one of the ways in which the rental value of the property had become diminished. The court specifically instructed the jury that the plaintiffs were entitled only to the actual loss of rent, and that they could recover no other damage. Under the instructions, the admission of the evidence complained of was not prejudicial to the defendant.

IV. The defendant complains of the action of the court in striking out a portion of the answer of Tschrigi, the city engineer, that a certain red line upon the profile of Julian avenue was the only grade marked upon the profile. The effect of this testimony is obscure, and is not clearly shown by the argument. We cannot say that in this action there was such error as should reverse the case. It seems that the witness afterward explained fully what was shown by the red line, and that plaintiffs' objection to the testimony was overruled.

V. The only instruction of the court of which the defendant complains is, that plaintiff could recover damages for a time extending from the building and operation of the road down to the filing of the amended petition. The defendant insists that, during a portion of this time, after the passage of chapter 96, laws of the Eighteenth General Assembly, the city had the right to authorize a street railway to use steam in

3. RAILWAYS
on streets:
damages to
lot owners:
evidence.

4. ERROR
cured by sub-
sequent rul-
ing: no
prejudice.

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its streets. But the city could not authorize such use without the payment of damages to lot owners.

VI. It is claimed incidentally, though not in consideration of any instruction or ruling of the court, that the city cannot be held liable for damages arising from the exercise of powers conferred upon individuals, without authority of the city charter. In support of this position 2 Dillon's Mun. Corp., Sec. 563, is cited. Inasmuch as this claim does not pertain to and is not based upon any ruling of the court below, we do not deem it proper to consider it. We discover no error in the record.

5. PRACTICE
in supreme
court : record
followed.

AFFIRMED.

32	307
88	711

MCARTHUR V. LINDERMAN ET AL.

1. **Judgment: PARTIES JOINTLY BOUND: SEVERAL JUDGMENTS SET ASIDE.** Where the evidence showed the defendants jointly liable for a certain sum, separate judgments against the several defendants for sums aggregating more than their joint liability were unauthorized and are set aside.
2. **Practice in Supreme Court: EFFECT OF AMENDED ABSTRACT BY APPELLEE.** Where appellant's abstract claims to contain all the evidence, but appellee denies this claim, and files an amended abstract containing evidence, without admitting that therewith all the evidence is brought before the court, the court will nevertheless, under rule 20, consider all the evidence to be thus supplied, and will proceed accordingly.

Appeal from Harrison District Court.

SATURDAY, DECEMBER 8.

THE plaintiff alleges in his petition that he assigned to Webster, Linderman & Co. certain judgments, as collateral security for a note, and that Barnhart and Cadwell, acting as attorneys for Webster, Linderman & Co., collected said judg-

McArthur v. Linderman et al.

ments, and appropriated to their own use all of the moneys collected above what was sufficient to satisfy said note. The plaintiff prays judgment for \$600. Trial to a jury, verdict and judgment for plaintiff against each of the defendants, J. W. Barnhart and E. P. Cadwell, for \$162.50. The defendant, Cadwell, appeals.

Sims & Cadwell, for appellant.

H. H. Roadifer and Smith & Clyde, for appellee.

DAY, CH. J.—I. The testimony shows without any conflict that the amount collected on the judgments was \$424.28, and that of this sum the defendants accounted to Webster, Linderman & Co., for \$232.08, leaving in the hands of defendants only \$191.20. The verdict against each of the defendants for \$162.50 is clearly unsupported by the testimony, unless it was the intention of the court that a satisfaction by one defendant should satisfy the whole judgment, which is not claimed.

II. The appellee claims, however, that the abstract does not contain all the evidence. The abstract contains a statement that it presents all the testimony offered and introduced upon the trial. The appellee filed an amended abstract, denying that the abstract of the appellant contains all the evidence and setting forth what is claimed to be some additional testimony, with the statement that it is furnished without admitting that therewith the abstract contains all the evidence. When the abstract of appellant does not purport to contain all the evidence, the appellee may set forth in his amended abstract omitted portions, with a statement that, with his additions, the abstracts do not contain all the evidence. But, where the abstract of appellant purports to contain all the evidence, the appellee must, under our rules, supply what he claims has been omitted. See Rule 20. The verdict is not supported by the evidence. The judgment is

REVERSED.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY V. SHERWOOD ET AL.

1. **Agent: POWER OF: RATIFICATION OF PRINCIPAL.** Upon consideration of the correspondence which passed between a land owner and his agent in this case, it is *held* that the agent did not have power to bind the principal by a sale of the land in question, without the ratification of the latter; and the fact that he had been in the habit of ratifying the sales made by the agent did not bind him to ratify this one.
2. **Evidence: LETTERS: RULE OF STATUTE.** Where a letter written to defendant was introduced, his reply thereto was admissible, under section 3650 of the Code.
3. **Practice in Supreme Court: QUESTION NOT RAISED BELOW.** An objection to evidence as being secondary cannot be made for the first time in this court.

Appeal from Palo Alto Circuit Court.

SATURDAY, DECEMBER 8.

THIS is an action in equity to enforce the specific performance of an alleged contract for the sale of block 70, in the town of Emmetsburg. The court found for the defendants. The plaintiff appeals. The material facts are stated in the opinion.

J. & S. K. Tracy and *Soper & Crawford*, for appellant.

Struble & Kinne, for appellees.

DAY, CH. J.—On the 10th day of June, 1881, the following contract was executed respecting the property in question: “Received of E. B. Soper three dollars, part purchase price of block No. 70, Corben & Lawler’s plat of Emmetsburg. Said Soper is to have 30 days from this date in which to determine whether he will take said property at the price of three hundred dollars cash. But if said Soper decides not to purchase said block, said money is to be forfeited, but no liability shall

The Burlington, Cedar Rapids & Northern Railway Company v. Sherwood et al.

be incurred on account hereof other than said sum so forfeited. If he takes the block and pays the money, a warranty deed shall be made therefor.

J. K. O. SHERWOOD,

"By E. J. HARTSHORN, agent."

On the 8th day of July, 1881, Soper elected to take said property, and paid the balance of the purchase price, and the following indorsement was made upon the contract: "Received of S. L. Dows, for E. B. Soper, two hundred and ninety-seven dollars, being the balance of the purchase price for block No. 70, of Corbin & Lawler's plat of Emmetsburg, due on the within contract.

J. K. O. SHERWOOD,

"By E. J. HARTSHORN, agent."

On the same day, Soper assigned all his interest in the contract to the Burlington, Cedar Rapids & Northern Railway Company. On the 26th day of July, 1881, Hartshorn reported to Sherwood his action in the premises, as follows: "I send you herewith deed to S. L. Dows, for block 70, for three hundred dollars, your price on the same, and it is well sold, as the block is too flat and wet for desirable residence property, particularly the south half of it." To this communication Sherwood replied on the 10th of August as follows: "I have received your favors of July 26. * * * * As to the lots and blocks wanted by the railroad company, I cannot consent to let them go at any such figures. * * * As I wrote you some time ago, I want to raise prices, and don't want to sell unless I can get higher figures. I think block 70 should now bring \$500 to \$600."

The whole controversy in this case turns upon the right of Hartshorn to bind Sherwood by a contract as to the price of the property in question. Hartshorn testifies that he never had any conversations, personal interviews, or personal communications, with the defendant, J. K. O. Sherwood, and that, whatever authority he had from him to act as his agent for the sale of his property, has been by correspondence and written communication. Sherwood resides in the city of New York. The first correspondence material to the matter

in controversy consists of a letter from Sherwood to Hartshorn, of February 18, 1879, as follows: "Mr. Schuman and I went over and fixed values to inclosed list, which would have reached you sooner, were it not for death in my family. In many instances these figures may be too high or too low. I take your judgment largely as to desirable and undesirable locations, etc. I want the whole estate to bring me \$6,000 from last January. If a buyer turns up for a lot, it should be sold, keeping this in mind, and getting as much more in proportion as he will pay. I'd like to clean it right off my books, at price named, within the year. If I have to hold and sell in a small way, prices should be increased to cover ten per cent annual interest. Let me know what you can probably sell at my figures ~~for~~ thereabout." This letter contained a list of lots and blocks, with prices attached, the price annexed to block 70 being three hundred dollars. On the 24th of February, 1879, Sherwood wrote Hartshorn as follows: "You have no doubt before this time received the list of lots and blocks, with prices affixed, to which you refer in yours of the 19th, and I shall soon expect to have your views. It is not necessary for me to say more concerning them at this time." On March 7th, 1879, defendant wrote as follows: "Answering your recent favor in relation to town property, I say if I have placed too high figures on the lots in block 23, I consent to reduction. You can bear this in mind, should any inquiry for them be made." On the 5th of February, 1880, Sherwood wrote Hartshorn from Des Moines, as follows: "In hope of meeting you, I remained here since yesterday p. m. I would wait another day, but other business, and the fact of our having sustained some loss by wind and water to our Manhattan Beach property, of which loss I am just advised by wire, cause me to go up to Emmetsburg, and thence to Kansas, without loss of time. I will see Mr. Tilford and go over the town lot matter with him, and hope, with a better understanding on my part, you will find sale for much of the property the coming spring." Immediately

The Burlington, Cedar Rapids & Northern Railway Company v. Sherwood et al.

after writing this letter, Sherwood went to Emmetsburg, and, in connection with Tilford, an employe in Hartshorn's office during his absence, made out a revised list of prices, upon which also block 70 was valued at three hundred dollars. December 15, 1880, Hartshorn wrote as follows: "You will recollect that we had some correspondence last summer with reference to sale of block No. 132 of your town property here, and you wrote me that the party who had been talking with me about buying it could have it for three hundred and fifty dollars. At the time I did not look over your list of lots and prices, but on doing so recently I find that the list of prices you left with Mr. Tilford, when here last winter, has this block for sale at three hundred dollars. So I judge you wrote that letter without looking over your prices, thinking his offer of three hundred dollars was below your price. I consider three hundred and fifty dollars high for blocks thus located, and do not know of any being sold so high of similar character and location. This party would like said block now, and would pay three hundred dollars cash for it, but he says he would pay no more. As you left it in my hands for sale at that price, I should have felt authorized to have sold it for said sum, but for your letter above referred to. The locality is settled up entirely with Catholic Irish, and the block would not be salable except to one of that class and faith, and I do not believe it will bring more than the above for a long time." To this Sherwood replied, December 21, 1880, as follows: "With regard to block 132, for which you submit offer under date of fifteenth inst., I say I recollect the correspondence and facts you refer to. I told Mr. Tilford distinctly the prices were subject to my approval, and, in all cases where time elapsed before offers were made, interest at the rate of ten per cent should be added to the price fixed. I have taken a good deal of stock in the future of your town, and, if I am to hold my property there and work it slowly, I want to get about as much as others do who own lots of about the same value. I concede you put the matter in a nutshell

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as to the effect with the better class of that church and property near by, but that class in all communities live, and generally pay dear for small potatoes, in what to them are favored spots. I believe sales can be made at stiff prices of every lot in that locality. Again I say, if the party is prepared to pay three hundred and fifty cash, and accept by January 1 next, or thereabouts, let him have it. If not, hold it at four hundred dollars, and mark up all the lots near the cathedral.”¹

On June 10th, 1881, Hartshorn wrote as follows; “A party desires to purchase the n. e. $\frac{1}{4}$ of block No. 23, being lots 18 to 23 inclusive, and has offered two hundred dollars cash therefor. You have the east half of that block, twelve lots, valued at five hundred and fifty dollars, but it seems rather high, as the land is of a wet, low order, as you will recollect. This party only wants the six lots named.” To this Sherwood replied, July 11, 1881, as follows: “I don’t care to sell a part of block 23. I will take from that party five hundred and fifty dollars cash for the twelve lots, and no less. If he wants it now, let him close, or, if not, add ten per cent interest to five hundred and fifty dollars, my figures of a year ago.” July 14, 1881, Sherwood wrote: “Other property so generally being on the boom, had I not better advance prices?” The foregoing contains the principal correspondence respecting the matter in controversy. While it shows that Hartshorn was placed in charge of the property, and was authorized to negotiate sales, it does not establish Hartshorn’s authority, at the time the contract in question was entered into, to bind the defendant as to prices. It is true, Tilford testifies that, at the time the revised list was prepared, it was given as the prices on the lots, and Sherwood did not instruct him, as Hartshorn’s representative, not to make contracts on the prices affixed, without first submitting the offer for ratification. But this list was prepared in February, 1880, and the sale in question was not made until June, 1881. In December, 1880, Sherwood advised Hartshorn that the prices were to be subject to his approval, and, whether this limita-

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tion was or was not imposed when the list was furnished, the letter of December 21, 1880, operated as such limitation. In view of this letter, taken in connection with the other correspondence, we do not think Hartshorn was authorized to sell the block in question at the price fixed in February, 1880. The appellant claims, however, that the letter of December 21, 1880, is not competent evidence. The letter is a reply to a letter introduced by the plaintiff, and, as such, it is clearly competent, under section 3650 of the Code. It is further insisted that the letter is a copy of a copy, which is not admissible, as long as the letter press copies are in existence. No such objection was made in the court below, and it cannot be urged for the first time here. Further, it is claimed that Sherwood has adopted and approved other sales made by Hartshorn. This he clearly had a right to do, under the power which he reserved to pass upon the price. The adoption of one sale does not bind him to approve another. The judgment is

AFFIRMED.

62	314
78	436

62	314
d115	278

62	314
116	335
e116	336

62	314
d130	431
130	438

62	314
f132	444

62	314
143	296

LEAVER V. GAUSS.

1. Conveyance: TESTAMENTARY IN CHARACTER: REVOCATION OF.

Where a conveyance contained words purporting to convey real estate in the usual form, but also contained the following language: "To commence after the death of both of said grantors;" and "It is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the grantors or either of them shall live;" *held* that no present estate to commence at a future day was created, as contemplated by section 1933 of the Code, and that the conveyance was testamentary in character, and could be revoked by the grantors at their option, notwithstanding a valuable consideration may have been paid therefor.

Appeal from Plymouth Circuit Court.

SATURDAY, DECEMBER 8.

ACTION to remove a cloud from the plaintiff's title, and to

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quiet the same. The plaintiff avers that he is the owner of the real estate in question, but that the defendant makes some claim to it. He admits that he and his wife, Heinricke Leaver, executed to the defendant an instrument somewhat in the form of a deed, but he avers, in substance, that it was to take effect only after the death of himself and wife, and that it was, therefore, testamentary in its character, and he now desires to revoke and cancel the same. He sets out a copy of it as an exhibit annexed to his petition.

The defendant, for answer, denies that the instrument is testamentary in its character, and avers that it was executed for a valuable consideration paid by him to the plaintiff, and was intended to convey to the defendant an estate in the premises, which should be absolute upon the death of the plaintiff and his wife. He admits that the copy of the instrument set out by the plaintiff is correct; from which it appears that, after containing words purporting to convey the premises in the usual form of a deed, it contains also the following: "to commence after the death of both the said grantors"; and also the following: "It is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the said grantors or either of them shall live, and that, after the death of both the said grantors, the grantee shall have and hold the premises by fee simple title."

To the answer the plaintiff demurred, and the demurrer was sustained, and the defendant electing to stand upon his answer, judgment was rendered for the plaintiff. The defendant appeals.

Struble, Rishel & Sartori, for appellant.

C. Gottschalk and Argo & Kelly, for appellee.

ADAMS, J.—The instrument purports to have been executed in consideration of love and affection. The answer avers that it was executed in consideration of the payment by the

defendant of certain indebtedness due from the plaintiff. If such fact could properly be pleaded as against the instrument, it must be deemed admitted by the demurrer. The defendant relies largely upon this fact to support his position that the instrument was not testamentary in its character, but immediately operative and binding upon the property. He insists that the instrument, when taken altogether, and especially if construed in the light of the fact which he pleads in respect to a valuable consideration paid, must be deemed to have had the effect to convey the property, subject to a life estate in the plaintiff and his wife.

We have to say, however, that we do not see how we can give the instrument the effect claimed, without contravening one of its express provisions. It declares that it is agreed "that the grantee shall have no interest in said premises as long as the grantors or either of them shall live." The defendant asks us to hold that he has now an interest in the premises.

We do not forget that the statute provides that "estates may be created to commence at a future day." Code, § 1933. But we have to say that any language employed by the grantor, which would be sufficient to create an estate to commence at a future day, would, in the nature of the case, give a present interest in the property. The estate would stand created, and the enjoyment postponed. A declaration that the grantee takes no interest during the life of the grantor is equivalent, we think, to a declaration that no estate is created. The instrument, it is true, evinces an intention favorable to the grantee, but that intention is in substance only testamentary, and is, of course, subject to revocation, if indeed a revocation is needed to prevent it from becoming operative.

The object of the defendant's averment that a valuable consideration passed, was to give the instrument a present operation as binding the property. It was of no consequence in any other respect. If the court below had held that it was proper to plead and prove such fact, it would have held virtually

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that an express provision of the instrument could be over-turned.

We can conceive that a valuable consideration might pass as an inducement to the person receiving it to make a devise. If a devise in form should be made under such inducement, the instrument by which it should be made would still be testamentary, and, being such, would be revocable.

We think that the court below did not err.

AFFIRMED.

READ V. MIDDLETON, SHERIFF.

1. **Replevin: OF UNDIVIDED INTEREST IN GROWING CROP.** Where chattels of the same nature and quality, belonging to different owners, are mingled in one mass, any owner may claim his share by replevin; but where the property is not susceptible of division, as in the case of a growing crop, replevin will not lie, because the undivided share sought to be recovered cannot be seized and delivered to the plaintiff.

Appeal from Harrison District Court.

SATURDAY, DECEMBER 8.

THIS is an action of replevin, by which it was sought to recover an undivided half of twenty acres of growing corn. There was a demurrer to the petition, which was overruled, and defendant appeals.

E. P. Cadwell, for appellant.

S. I. King and Evans & Roadifer, for appellee.

ROTHROCK, J.—It appears from the allegations of the petition that, on the eighth day of June, 1881, an execution was issued on a judgment against P. E. Cromer. Said execution was levied upon an undivided half of twenty acres of grow-

Read v. Middleton, Sheriff.

ing corn, and the same was advertised to be sold on the sixth day of August, 1881. On the eleventh day of July, 1881, Cromer made a chattel mortgage on the corn to the plaintiff. This action was brought to recover the corn from the sheriff. Among other grounds of demurrer, it is claimed that the action of replevin will not lie for an undivided interest in a growing crop of grain. It is well settled that, where chattels of the same nature and quality belonging to different owners are mingled in one mass, any owner may claim his aliquot part by replevin. *Kauffman v. Schilling*, 58 Mo., 218; *Inglebright v. Hammond*, 19 Ohio, 337; *Ryder v. Hathaway*, 21 Pick., 305; *Young v. Miles*, 20 Wis., 615; *Kimberly v. Patchin*, 19 N. Y., 330.

But where the property of joint owners is not susceptible of division, as in case of a growing crop, or in case of the joint ownership of a single piece of property, replevin will not lie by one joint owner, because the property sought to be recovered is not susceptible of seizure and delivery to the plaintiff. *Kauffman v. Schilling*, *supra*; Wells on Replevin, 88 and 89. *Jones v. Dodge*, 61 Mo., 368, was an action in replevin to recover a part of a crop of corn standing ungathered in a field. It was held that a division of the crop by an officer was not practicable, and that the action would not lie, and that, to maintain the action, the property must be such as can be seized by the officer and delivered to the plaintiff. We think the demurrer to the petition should have been sustained.

REVERSED.

PARSONS V. THOMAS.

1. **Execution:** NOTICE TO SHERIFF OF OWNERSHIP: STATUTE CONSTRUED. Section 3055 of the Code applies to persons other than the execution defendant, and does not require him to notify the sheriff that property levied upon belongs to him, before he can maintain an action to recover the property as being exempt from execution
2. **Evidence:** UNAUTHORIZED ACTS AND DECLARATIONS. Evidence of the acts and declarations of a party not first shown to have been authorized to act and speak for the plaintiff, cannot be admitted against him.
8. **Instructions:** REPETITION NOT REQUIRED. It is not error to refuse to give instructions asked, which are fully covered by other instructions given by the court on its own motion.

62	319
92	388
62	319
103	366
62	319
127	716

Appeal from Adams District Court.

SATURDAY, DECEMBER 8.

THIS is an action of replevin for two horses and one set of double harness, levied upon by the defendant, as sheriff, under an execution against the plaintiff, and which the plaintiff now claims were exempt from execution, as the team and harness with which he habitually earned his living as a farmer. Trial to a jury, and verdict and judgment for the plaintiff. The defendant appeals.

R. A. Moore, for appellant.

W. O. Mitchell, for appellee.

DAY, CH. J.—I. The petition does not allege that, before commencing the action, the plaintiff served upon the officer a notice in writing of his claim to the property. The defendant demurred to the petition upon this ground, and the court overruled the demurrer. The defendant thereupon filed an answer, alleging that the plaintiff never at any time gave him written notice of his claim to the property, or that he claimed it as exempt, prior to the commencement of this action. On

1. EXECUTION:
notice to
sheriff of
ownership:
statute con-
strued.

motion of plaintiff, this averment was stricken from the answer as irrelevant and immaterial, and constituting no defense. Upon the trial the defendant was introduced as a witness, and was asked to state if, prior to the bringing of this suit, plaintiff had notified him in writing that he claimed this team as exempt, or that he claimed it in any way. The question was objected to, and the objection was sustained. The defendant also requested the court to instruct the jury that, if plaintiff never notified the sheriff or his deputy, in writing, that he claimed the property as exempt from execution before the beginning of this suit, they should find for defendant. The court refused to give this instruction. Appellant complains of these several rulings, and insists that the defendant was entitled to notice of the plaintiff's claim to the property before the commencement of the suit, under section 3055 of the Code. Section 3055 of the Code applies to a case where some other person notifies the sheriff that the property belongs to him, and not to a case where the execution defendant claims that the property is exempt from execution. See *McCoy v. Cornell*, 40 Iowa, 457.

II. It is insisted that the court erred in not admitting evidence of what the plaintiff's son, twenty years of age, said, after the officer had seen the horses in the stable and concluded to levy, and after he had gone to the house to make his return upon the execution. The levy was made in Adams county when the plaintiff was in Fairfield. It does not appear that the plaintiff's son had any authority to bind him by his declarations. The court also rejected evidence as to who was in possession of the teams when the officer went to make the levy. It is claimed that this evidence was offered to support the allegation of the answer that the plaintiff voluntarily turned the property over to the defendant. But, as the plaintiff was not present, the proffered testimony would not tend to establish this allegation of the answer, unless it was proved that

2. EVIDENCE:
unauthorized
acts and declarations.

 ROYER v. FOSTER.

the person in possession was authorized to turn out the property. No such testimony was proposed. There was no error in rejecting the evidence offered.

III. It is insisted that the court erred in sustaining an objection to a question asked Harry Parsons, in reference to what teams his father had in the spring of 1882. The levy was made on the seventeenth of August. It is immaterial what teams the plaintiff had in the spring of that year.

IV. The appellant insists that the court erred in refusing the first and second instructions asked by the defendant.

These instructions were fully covered by the instructions given by the court on its own motion, and which correctly present the law of the case. The verdict is not unsupported by the evidence.

AFFIRMED.

62	391
78	640
62	391
93	388

ROYER v. FOSTER.

- 1. Original Notice: SERVICE BY PUBLICATION: AUTHORITY OF CLERK TO ORDER.** Under the laws in force in September, 1857, the clerk of the district court had no authority to order the publication of an original notice in a foreclosure proceeding, upon the return of the sheriff, "not found," and such notice gave the court no jurisdiction of the defendant, and the proceedings based thereon were void, and did not serve to convey the defendant's title to the mortgaged premises to the purchaser at the foreclosure sale.
- 2. Vendor and Vendee: PURCHASE OF SUPERIOR TITLE BY VENDEE: RIGHTS AGAINST VENDOR ON COVENANTS OF WARRANTY.** Where one takes a deed with covenants of warranty, but his title proves worthless, he may yield to and acquire the superior title, and, having done so, he may resort to the covenants of warranty for the recovery of the amount expended, not exceeding the amount, with interest, paid the warrantor. The vendee cannot, in such case, be compelled to pursue equities to which he might be subrogated, for the purpose of making himself whole.

Royer v. Foster.

3. **Bill of Exceptions:** ENTERING UPON THE APPEARANCE DOCKET. The provision in section 200 of the Code, that no pleading shall be considered as filed until the required memorandum is made upon the appearance docket, does not apply to a bill of exceptions.
4. **Reporter's Notes:** PRESUMPTION IN FAVOR OF. Where the trial judge certified on a certain date that the attached reporter's notes contained all the evidence introduced or offered, and judgment was not rendered until some months afterward, it will not be presumed, in the absence of a showing, that any other evidence was offered after the certificate was made.

Appeal from Polk Circuit Court.

SATURDAY, DECEMBER 8.

THE plaintiff claims of the defendant \$400 on account of an alleged breach of the covenants of seizin and warranty in a deed conveying eighty acres of land. The cause was tried to the court, and judgment was rendered for the defendant. The plaintiff appeals. The facts are stated in the opinion.

Nourse & Kauffman, for appellant.

Barcroft, Bowen & Sickmon and *Brown & Dudley*, for appellee.

DAY, CH. J.—I. The material facts of the case are as follows: In July, 1856, one J. W. Baird, being the owner of two hundred and eighty acres of land, including the eighty acres involved in this controversy, executed a mortgage thereon to one M. Moore, to secure the payment of \$1,300. Thereafter foreclosure proceedings were instituted in the Dallas district court, and on the 20th day of October, 1857, judgment of foreclosure was entered by default. In the foreclosure proceeding, an original notice was issued in the usual form, directed to J. W. Baird, and was, on the 7th day of September, 1857, returned "not found," whereupon the clerk of the court ordered that the notice be published in the *Independent Press* for four weeks, which was done. Upon this notice default was entered, and judgment was rendered. Under this

Royer v. Foster.

foreclosure proceeding the land was sold, and was purchased by Moore, the judgment creditor, to whom a sheriff's deed was executed January 3d, 1859. Afterward Moore mortgaged said premises to Peter W. Field, and, under foreclosure proceedings and sale thereon, a sheriff's deed therefor was executed to said Field on the 11th day of June, 1860, who thereafter deeded said premises to the defendant, Jere P. Foster.

On the 3d day of August, 1868, Foster and wife conveyed, with the usual covenants of seizin and warranty, one hundred and twenty acres of said land to one E. F. Frush, for the consideration of \$600, and on the 25th day of November, 1871, E. F. Frush and wife, for the consideration of \$700, conveyed, with the usual covenants of seizin and warranty, eighty acres of said land to the plaintiff.

On the 5th day of February, 1878, J. W. Baird and wife, for the consideration of \$50, without warranty, conveyed the land in controversy to one C. A. Anthony, who thereupon took possession of the land, which was unimproved open prairie, and commenced fencing and breaking the same.

On the 26th day of July, 1880, Anthony and wife, for the expressed consideration of \$600, conveyed to plaintiff the eighty acres of land now in controversy.

The agreement of purchase between Royer and Anthony was as follows: "Whereas Jacob Royer has this day purchased of C. A. Anthony, and received of him a deed for, the following real estate, to wit: * * * *, for the consideration of six hundred dollars, and whereas said Royer desires time to pay said consideration, and whereas said Royer has a claim against J. P. Foster, (who conveyed said land to one E. F. Frush, by warranty deed, and by said Frush to him conveyed, by warranty deed, the title to which has wholly failed,) for the sum of four hundred dollars, with six per cent interest from the 3d day of August, 1868, as damages for the breach of the covenants of warranty of the said Foster; now, therefore, said Royer agrees to pay said

Anthony, out of the proceeds of said claim, when collected of and paid by said Foster, the said six hundred dollars, with six per cent interest from this date."

At the time of the execution of this agreement, there was pending in the federal court an action of right, relating to the eighty acres of land in question, in which Royer was plaintiff and Anthony and others were defendants. J. W. Baird removed to Indiana, March 1, 1859, and has ever since continued a resident of that state.

From the foregoing statement of facts, it appears that the plaintiff's title is derived through the foreclosure proceeding instituted by Moore against Baird, in which the order for publication was made by the clerk. The clerk had no authority to make the order of publication; no jurisdiction over the matter then in controversy was thereby acquired; and the foreclosure proceedings were void. See *Robertson v. Young*, 10 Iowa, 291; *Abell v. Cross*, 17 Id., 171; *Bardsley v. Hines*, 33 Id., 157.

It follows that the plaintiff, through the conveyance to him, did not acquire the title of Baird, and that the covenants of warranty have been broken. Anthony acquired the superior title of Baird, and asserted it by taking the possession of the land. The plaintiff had a right to yield to and acquire this superior title, and, having done so, he may resort to the covenants of warranty for the recovery of the amount expended, not exceeding the consideration money, and interest, received by Foster. We see nothing in the agreement between the plaintiff and Anthony which should defeat the plaintiff's recovery.

It is insisted that the plaintiff, through the conveyance to him, became subrogated to the rights of the mortgagee, Moore, and that he may proceed to foreclose the mortgage, and thus protect his title. But the plaintiff purchased a legal title, and he cannot now be put off with a mere equity. Besides, it seems that the right to foreclose the mortgage is now

1. ORIGINAL
notice : ser-
vice by publi-
cation: au-
thority of
clerk to or-
der.

2. VENDOR
and vendee :
purchase of
superior title
by vendee :
rights against
vendor on
covenants.

fully barred by the statutes of Indiana, where the mortgagor, Baird, has continuously resided since March 1, 1859. In our opinion, the court erred in finding for defendant.

II. It is claimed there is no bill of exceptions in the case, because the filing of what purports to be the bill of excep-

3. BILL of ex-
ceptions: en-
tering on ap-
pearance
docket.

tions was not entered on the appearance docket, as provided in section 200 of the Code. This sec-

tion, in so far as it provides that no pleading of any description shall be considered as filed in the cause until the required memorandum is made, does not apply to a bill of exceptions. It is further insisted that the reporter's

4. REPORT-
ER's notes:
presumption
in favor of.

notes were marked filed, March 28, 1882, and that the trial was not completed and the judgment rendered until October 11, 1882, and that there is nothing to show as to what evidence was introduced between those dates. A certificate of the judge is attached to the reporter's notes, stating that they contain all the evidence introduced or offered in the cause. There is no presumption that evidence was introduced after the signing of such certificate. If such be the fact, it is incumbent upon the appellee to show it.

III. It is claimed that the assignments of error are not sufficiently specific or definite to raise any question for our consideration. We regard the assignments as sufficiently specific to raise the question of the correctness of the judgment upon the evidence introduced. The judgment is

REVERSED.

HOARD V. THE CITY OF DES MOINES.

1. **Watercourses: RIGHT OF PROTECTION FROM OVERFLOW.** Every owner of land has a right to protect himself from overflow in times of flood by water from a river, even though, by excluding the water from his own premises, he deepens it between his land and the river; and, on the same principle, a city may protect its territory from overflow by the construction of a levee, and, in the absence of negligence, will not be liable to one who owns a lot between the levee and the river.

Appeal from Polk Circuit Court.

SATURDAY, DECEMBER 8.

THE plaintiff, and other persons, are the owners of certain lots situated on and near the east bank of the Des Moines river, in the city of Des Moines. These lots have been subject to overflow in times of flood from the water of the river, and from the Coon river, which empties into the Des Moines river from the west. In 1880 the city authorities constructed an embankment or levee along the first street east of the plaintiff's lots, and nearly parallel with the river, This embankment was raised above high water mark, so as to prevent overflow from the rivers upon that part of the city lying east of the levee. The plaintiff claims damages; and he alleges that, before the levee was constructed, the water in times of overflow passed over his lots to the east, and was discharged across that part of the city, and into the river, some distance below the city. He claims that the levee causes the water to stand upon the lots between it and the river in times of floods, and that the lots are thus injured and damaged.

Some ten actions were brought in the names of different owners of lots. All of these actions were consolidated, and a jury was impaneled, and the plaintiff introduced his evidence. The court, on the motion of the defendant, instructed the jury to return a verdict against the plaintiff, upon the ground

that there was no evidence tending to prove a cause of action. Plaintiff appeals.

Bryan & Bryan, for appellant.

Williamson & Kavanaugh, for appellee.

ROTHROCK, J.—It is not claimed that the city obstructed a natural stream by the erection of the levee. The most that can be claimed from the evidence is that, after the levee was constructed, the water in time of overflow was deeper on plaintiff's lots, because by the levee it was not permitted to overflow that part of the city east of the levee, and pass off in that direction. The evidence does not show that the levee could have been constructed upon the bank of the river, or between plaintiff's lots and the river. On the contrary, it is shown beyond question that the river bank is largely composed of sand, which for years has been cut away by the action of the water, so that, at the time the levee was built, some of the lots on the river bank had been partly washed away. At the time the levee was constructed, it could not have been located on the river bank without being built on private property, at least in part. The plaintiff complains that the defendant was negligent in constructing the levee on the line as located, but there is no evidence showing that it could have been constructed between the plaintiff's lots and the river. It was the undoubted right of the city to protect as much of its territory from overflow as could be protected. Every owner of land has a right to protect himself from overflow by water from a river, even though, by excluding the water from his own premises, he deepens it between his land and the river. It appears to us that what the plaintiff claims is, that he has the right to plant himself on low ground next to a river, and insist that overflow water shall pass over his land on to the land of other persons. That he has no such right requires neither argument nor authority to demonstrate.

AFFIRMED.

MARTIN & SELLERS V. CROCKER.

1. **Appeal from Justice's Court: TAKEN TOO LATE: HOW DISPOSED OF: JURISDICTION.** Appeals from justices' courts must be taken within twenty days after the rendition of judgment. When taken later, there is no appeal in law, and a motion to strike the appeal from the docket would be the proper practice; but where an order is made, upon motion, to dismiss the appeal, the court has no jurisdiction to render judgment upon the appeal bond, or any other judgment, except for costs.

Appeal from Story Circuit Court.

SATURDAY, DECEMBER 8.

THE plaintiffs recovered a judgment against the defendant before a justice of the peace. The defendant filed a bond for an appeal, but not until after the lapse of more than twenty days from the rendition of the judgment. The appeal, however, was allowed by the justice, and a transcript was filed in the circuit court. The plaintiffs moved in the circuit court for an order dismissing the appeal, and for judgment on the appeal bond against the defendant and his sureties. The court sustained the motion to dismiss, but refused to render judgment on the appeal bond, and overruled the motion for such judgment. From the order overruling the motion for judgment the plaintiffs appeal.

Martin, Sellers & Barnes, for appellants.

Funson & Gifford, for appellee.

ADAMS, J.—Three questions are certified, but it will be sufficient for the disposition of this case to determine one of them. The question is in these words: "When an appeal is taken or allowed from a justice of the peace, under section 3580 of the Code, after the lapse of more than twenty days from the rendition of the judgment, and an appeal bond is filed to stay proceedings and to perfect the appeal, is the appellee entitled

Long v. Smith et al.

to judgment against the principal and sureties on his bond, or either of them, for the judgment in the justice's court, in this court?"

Appeals from a justice of the peace must be taken within twenty days from the rendition of the judgment. Code, § 3576. The alleged appeal in this case, having been taken after the lapse of twenty days, was in effect no appeal. There was, then, really no appeal to dismiss. Strictly, we think that the plaintiffs should have moved to strike the case from the docket, on the ground that no appeal had been taken in the case. But the dismissal of the alleged appeal was equivalent to striking the case from the docket. We do not think that the court had jurisdiction to render any judgment except for costs.

The plaintiffs rely upon section 3580 of the Code, which provides that where the appeal is dismissed judgment shall be rendered on the bond. But we think that the provision has application to a case where there has been an actual appeal. In our opinion the question certified should be answered in the negative, and the judgment

AFFIRMED.

LONG V. SMITH ET AL.

1. **Tax Sale and Deed: DEFECTIVE NOTICE: CERTIFICATE NOT MERGED IN VOID DEED.** Where the holder of a certificate of purchase at tax sale surrendered his certificate and obtained a deed upon a defective and insufficient notice of the expiration of the time of redemption, the deed was void, and the surrender and cancellation of the certificate were also void, and the holder thereof had the right thereafter to proceed thereunder to lay the foundation for a deed by giving proper notice.
2. ———: **REDEMPTION FROM: OFFER TOO LATE.** Where the owner of land sold for taxes does not offer to redeem until after the holder of the certificate is entitled to a deed, which he is prevented from obtaining only by an injunction wrongfully sued out by the owner, the offer comes too late, and the title passes to the holder of the certificate.

62	329
92	104
62	329
120	69
120	70
120	71
120	112

Appeal from Guthrie District Court.

MONDAY, DECEMBER 10.

ACTION IN EQUITY. Both parties appeal.

C. A. and J. G. Berry and McCaughan, Dabney & McCaughan, for appellants.*Fogg, Long & Neal*, for appellee.

SEEVERS, J.—In 1876, the assignor of the defendant, Smith, purchased the real estate in controversy at a delinquent tax sale. In 1880, the defendant procured the treasurer to convey the premises to him, upon his surrendering the certificate of purchase, which was marked “canceled” by the treasurer, and filed in his office. The land when sold for taxes belonged to one McBride. In April, 1882, the plaintiff purchased the land of McBride, and the same was conveyed to him. When he purchased the land, the plaintiff had knowledge that it had been “sold at tax sale, and that a tax deed was standing against it.” About the time this action was commenced, the defendant discovered that the tax deed was void, because the notice required by law, and upon which the validity of the tax deed depended, had not been served upon the proper person. The defendant was taking steps to have the notice properly served, when the plaintiff filed an amended petition in equity, asking an injunction restraining the defendant from making completed service of said notice, on the ground that a tax deed had been issued and the certificate of purchase surrendered and canceled, as above stated. The injunction was granted. But for the injunction, the defendant, as appears from an agreed statement of facts, would have filed the required affidavits and made completed service of the notice on the third day of July, 1882, and would have been entitled to a deed in ninety days thereafter, or on the second day of October. The final

decree in this case was entered on the sixth day of October. An answer and cross petition were filed by the defendant, and a reply by the plaintiff. The reply was filed on the sixth day of October, and therein the plaintiff for the first time expressed a willingness to reimburse the defendant for money paid as taxes, if the court should be of opinion that he was entitled thereto. The district court determined that the plaintiff had the right to redeem, and required him to pay a fixed amount within a specified time. From this portion of the decree the plaintiff appeals. The court further decreed that, upon the payment of the money aforesaid, the title to the real estate should be quieted in the plaintiff. From this portion of the decree the defendant appeals.

The main controversy arises on the defendant's appeal. The original theory of the plaintiff, and upon which he obtained the injunction, was that, when the defendant surrendered the tax certificate and the same was marked canceled by the treasurer, and the premises conveyed to the defendant, then the certificate ceased to be evidence of the matters recited therein; that it had accomplished its purpose, and ceased to be a valid instrument upon which any right could be based. But a valid tax deed cannot be executed until ninety days after the completed service of the required notice. Code, § 894. The deed, therefore, was void, because prematurely issued. The deed being void, the surrender and cancellation of the certificate were also void. The certificate, therefore, had the same force and effect as if it had never been surrendered. The defendant thereunder, and by virtue of the purchase at tax sale, was entitled to a deed upon giving the requisite notice. The plaintiff had the right to redeem at any time prior to the time the defendant was entitled to a deed, and not afterward. *Pearson v. Robinson*, 44 Iowa, 413; *Schofield v. McDowell*, 47 Id., 129.

But for the injunction, the defendant would have been entitled to a deed on the second day of October, 1882. The plaintiff did not offer to redeem until the sixth day of Octo-

ber, 1882, or not until after the defendant was entitled to a deed. He had knowledge of the sale, and of the time his right to redeem would expire. The district court held that the injunction was wrongfully obtained. By his own wrong the plaintiff prevented the defendant from obtaining the conveyance he was legally entitled to.* But the plaintiff's right to redeem expired when the defendant became entitled to a deed. The pendency of the action should not affect the rights of the parties. The plaintiff could have offered to redeem prior to the time the defendant became entitled to a deed. The right to redeem must be exercised within the time given by the statute. Failing to do so, such right cannot be afterward exercised, and, if the right did not exist, the court could not give it in or by the decree. It is unnecessary to consider the appeal of the plaintiff, further than to say that he has leave to withdraw from the court below the money paid in pursuance of the decree. The defendant is entitled to a conveyance from the treasurer and to have the title quieted in him.

REVERSED.

DAVIDSON V. DWYER, SHERIFF, ET AL.

1. **Practice in Supreme Court:** OBJECTIONS NOT MADE BELOW NOT CONSIDERED. Objections to the admission of testimony not made in the trial court cannot be first urged on appeal to this court.
2. **Fraudulent Conveyance Rescinded:** EFFECT OF. Where property is transferred with a fraudulent intent, but is afterwards transferred back again before the intent is consummated, no rights are lost or acquired by the transaction.
3. **Execution:** ESTOPPEL OF CLAIMANT NOT RESISTING LEVY. Where one, some time prior to the levy of an execution, disclaimed any interest in the property levied on, and, at the time of the levy, without consenting thereto, simply pointed out to the officer the particular property for which he was looking, *held* that by these acts he was not estopped from setting up as against the officer his title to the property acquired subsequent to his disclaimer.

Davidson v. Dwyer, Sheriff, et al.

Appeal from Henry Circuit Court.

MONDAY, DECEMBER 10.

ACTION of replevin for certain horses, and corn in the crib. There was a judgment upon a verdict for plaintiff. Defendant appeals. The facts of the case fully appear in the opinion.

Amblers & Campbell, for appellant.

Woolson & Babb, for appellee.

BECK, J.—I. The defendant, Dwyer, as sheriff, levied upon the property in question a special execution issued upon a judgment against M. G. Davidson. The property was seized under an attachment in the case, issued before judgment, and was released upon a delivery bond given by J. W. Anderson, a claimant of the property. The plaintiff, among other matters, alleges in his petition that the property, before these proceedings were had, belonged to M. G. Davidson, who delivered it to plaintiff before the attachment, to secure an indebtedness from M. G. Davidson to plaintiff, under an agreement that plaintiff was authorized to sell the property and apply the proceeds in payment of the debt.

The defendants in their answer allege that plaintiff, as the agent of M. G. Davidson, for the purpose of defrauding the creditors of M. G. Davidson, transferred the property by bill of sale, duly recorded, to J. W. Anderson, and that, at the time of the levy of the attachment, plaintiff disclaimed to the defendants ownership of the property, and, when the execution was levied, plaintiff surrendered the property to the officer. There is no averment in the answer that the delivery of the property to plaintiff, under the arrangement that he should hold it as security and sell it to pay the debt, was fraudulent as to creditors of M. G. Davidson. . The sale by plaintiff, as agent, to Anderson is alone assailed on that ground.

Davidson v. Dwyer, Sheriff, et al.

Upon the trial, plaintiff introduced evidence tending to prove the delivery of the property to him by M. G. Davidson, and the agreement under which it was delivered. He introduced no evidence before he rested his case touching the transfer to Anderson. Defendant gave evidence tending to prove the sale to Anderson, as alleged in the answer. Thereupon plaintiff, in rebuttal, against defendant's objection, was permitted to prove that after the sale to Anderson it was rescinded by the parties, and the consideration thereof was repaid by plaintiff to Anderson, and the property was delivered again to plaintiff. This appears to have been done after the property was released upon the delivery bond, and before the levy of the execution.

II. The defendants insist that the court erred in admitting the evidence, on the ground that it was not competent in rebuttal. But this objection cannot be urged in this court, for the reason that it was not made in the court below. The only objection made there to the evidence is based upon the ground that it is "incompetent, irrelevant and immaterial under the pleading in the case." Objections not made in the court below cannot for the first time be urged in this court. The evidence was not subject to the objection made in the court below. The defendant relied as a defense upon the transfer of the property to Anderson. It would surely be competent to show that the sale to him was rescinded, in answer to the defense based upon the transfer.

III. Complaints are made of the giving and refusing of instructions which relate to the transaction with Anderson.

We discover no error in the court's rulings. Plaintiff bases his claim upon the transfer to him of the property by M. G. Davidson. Defendants do not allege in their pleadings that this transaction was fraudulent. It was sufficient to give plaintiff property in, or a lien upon, the horses and corn, which supports his right to maintain this action. The trans-

1. PRACTICE
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fer to Anderson cuts no figure in the case, for the reason that it was canceled. If it should be conceded that it was made with a fraudulent intent, the cancellation leaves nothing of it, and the fraudulent intent was not consummated. There can be no rights lost or acquired by a fraudulent purpose which is not executed. But it is difficult to see how the transaction with Anderson can be regarded as fraudulent, without assailing the transfer to plaintiff, which is not done by defendants.

IV. Defendants insist that plaintiff is estopped by his acts, and his disclaimer of ownership of the property.

We think differently. When these occurred, Anderson held the property under the transfer to him, which was subsequently canceled.

Under this transfer, Anderson claimed the property, and plaintiff assented to his claim. But the cancellation of the transfer changed the title of the property. Surely plaintiff by his acts and disclaimer could not be estopped from setting up a claim which he subsequently acquired. Defendants were not deceived, or induced to levy upon the property, by anything plaintiff did or said. They insisted that the defendant in execution was the owner of the property. If the transfer of it to plaintiff was valid, either he or Anderson, whichever at the time held the title under the transfer, could successfully resist the levy of the execution.

Plaintiff's act in pointing out the property which the sheriff sought to levy upon was not a waiver of his claim and title to it. All there was of the act is this: The defendants claimed that the property was subject to the execution, and proposed to levy upon it; plaintiff did not concede it, but pointed it out to the sheriff. This act was not an abandonment of his title or lien, nor would it operate to defeat an action to recover the property.

The rulings of the court upon the instructions given and refused are in harmony with the conclusions we have expressed. and are correct.

3. EXECUTIVE: estoppel of claimant not resisting levy.

Baxter v. Ray et al.

The foregoing discussion disposes of all questions presented in the argument for defendants. The judgment of the circuit court will be

AFFIRMED.

BAXTER V. RAY ET AL.

1. **Execution: NOTICE OF CLAIM BY THIRD PARTY: INDEMNIFYING BOND.**
Where an officer held several executions in favor of several plaintiffs, but against the same defendant, which he levied upon certain property as the property of such defendant, but the plaintiff herein claimed to be the owner of the property, and gave to the officer the notice prescribed by section 3055 of the Code, but gave only *one* notice, which was, however, made applicable to all the executions; and the execution creditors thereupon joined in *one* indemnifying bond; (Code, § 3056;) *held* that the one notice and the one indemnifying bond were a sufficient compliance with the statute, and that a separate notice and bond for each execution was not necessary.
2. ———: **ACTION ON INDEMNIFYING BOND: ESTOPPEL: JOINDER OF PARTIES AND CAUSES.** In such case, the execution plaintiffs who executed the indemnifying bond, and who, upon the security thus given, procured the property of the claimant to be sold, were estopped from insisting that the notice and bond were not a compliance with the statute; and, being all bound together, they could not claim that they were improperly joined as defendants in an action brought upon the bond by the claimant of the property, nor that there was a misjoinder of causes.
3. **Practice: ABSENCE OF JUDGE DURING ARGUMENT TO JURY.** A judge may properly be absent, when the business of the court requires it, while counsel are addressing the jury; and, unless prejudice is shown, a cause will not be reversed on account of such absence.

Appeal from Union Circuit Court.

MONDAY, DECEMBER 10.

ACTION upon an indemnifying bond executed by the defendants, pursuant to the provisions of Code, § 3056. There was a judgment upon a verdict for plaintiff. Defendants appeal.

S. S. Denning and *D. W. Higbee*, for appellants.

McDill & Sullivan, for appellee.

BECK, J.—I. A constable held five executions, issued upon as many judgments, against J. A. Baxter. Two of the judgments were in favor of one of the defendants, two in favor of another, and one in favor of the third. I. EXECUTION: notice of claim by third party: indemnifying bond. The writs were levied upon certain promissory notes as the property of the defendants in execution. Thereupon plaintiff caused a notice to be served upon the constable, as prescribed in Code, § 3055, claiming the property in the notes, and demanding possession thereof. There was but one notice, and it referred to and was made applicable to all the executions by its express terms. Thereupon the plaintiffs in execution, the defendants in this case, united in an indemnifying bond required by Code, § 3056. This bond recites the five judgments, naming the plaintiffs in each, the levy of the executions, the notice to the constable served by plaintiff, and other particulars. It is conditioned, as the statute requires, to pay to any claimant of the property the damages he may sustain in consequence of the seizure and sale of the property. The action is brought upon this bond.

II. The defendants in the court below, by objection to the introduction of the notice and bond in evidence, and by instructions to the jury asked by them, insisted that THE SAME. a separate cause of action arose upon each execution, and that there should have been a separate bond and notice applicable to each, instead of one applicable to all, and that there is a misjoinder of defendants and of causes of action. These objections are renewed in this court.

The purpose of the provision of the Code above cited requiring, upon notice in writing given by the claimant of property levied upon by execution, an indemnifying bond to be executed and returned with the execution, is the protection of

the officer and the claimant of the property. The latter, in case he establishes ownership of the property in himself, may recover the damages he has sustained by the seizure and sale of the property, which would ordinarily be the value of the property. When, as in this case, several executions at the same time are levied upon the property, which is sold upon the writs, there is not and cannot be successive and separate seizures and sales upon the separate executions, but the property is seized and sold upon all the executions as one act. This is true, though the officer may make separate returns to each writ. While the writs are in his hands, he acts upon all together, and not upon each separately. No possible benefit to any party could be attained by requiring separate notices and separate bonds for each execution. And no possible prejudice could have resulted to defendants by there being but one notice and one bond.

The defendants, responding to the requirements of the law, upon the notice to the constable executed the bond, which was regarded by the constable and plaintiff as sufficient to authorize the officer to sell the property; for they so treated them, and defendants obtained all the benefits and advantages they could derive from lawful papers of the kind. The notice and bond were by the defendants regarded as sufficient, and, by means of these instruments, they caused plaintiff's property to be sold upon the executions; they are estopped now to insist that the instruments are insufficient.

We are of the opinion that defendants are in no different or worse position than they would have been in had there been a notice and bond for each execution, the bonds in that case being executed by all of the defendants. In an action on one of them, the plaintiff could have recovered the value of the property against all of the defendants, and, having so recovered, he could not recover upon the other bonds.

It cannot be said that there is a misjoinder of causes of action or of defendants. The defendants are bound by the

2. — : action on indemnifying bond : estoppel : joinder of parties and causes.

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bond; upon it plaintiff has one cause of action against the defendants jointly.

The rulings of the court below upon the admission of testimony and upon the instructions are in harmony with the views we have expressed.

III. After the evidence was submitted, the court, against defendants' objection, directed and required the argument of counsel to be made to the jury when the judge was not present, but was conducting other business of the court in a separate room. The circumstances creating occasion for this course are not shown by the record. While, doubtless, the judge should have been present, unless his absence was required by sufficient cause, we would not disturb the judgment, unless prejudice resulting from his absence is shown or could be inferred. But there is no claim of or attempt to show prejudice, and no ground to infer that any resulted from his action to defendants.

We have held that a judge may properly be absent during the progress of a trial. *Hall v. Wolff et al.*, 61 Iowa, 559.

The foregoing discussion disposes of all questions presented in argument by defendants' counsel. In our opinion the judgment of the circuit court ought to be

AFFIRMED.

BYERS ET AL. V. MCCARTNEY, EX'R, ET AL.

1. **Corporations for Religious Purposes:** HOW LONG THEY CONTINUE. Whether the limitations placed by the statute upon the endurance of corporations for pecuniary profit apply to religious corporations, *quære*.

2. **Will: DEVISE TO UNINCORPORATED CHURCH:** HOW FAR VALID. Where there is a devise of real estate to a church incapable of taking the title, because not incorporated, the devise is not void, but the legal title descends to the heirs, charged with the trust, which they will be required to execute; or a court of equity will appoint a trustee to execute the

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trust, until the church becomes incorporated, and acquires the capacity to hold the legal title; following *Johnson v. Mayne*, 4 Iowa, 180; but the church in such case cannot take more than one-fourth of the estate of a testator who leaves a wife, child or parent. Code, § 1101.

Appeal from Jefferson Circuit Court.

MONDAY, DECEMBER 10.

IN August, 1877, Mary Byers executed her last will and testament, devising all her property, both real and personal, after the payment of debts and funeral expenses, to the Presbyterian church at Libertyville, Jefferson county, Iowa, and appointing the defendant, W. R. McCartney, executor. At the time of her death she owned certain real estate in question. The will was duly admitted to probate. In June, 1879, the plaintiffs, who are children of Mary Byers, deceased, commenced this action, alleging that the devises in the will of Mary Byers are contrary to statute, and that there is no beneficiary or devisee named in the will legally able and competent under the law to take a devise, and praying that the will be set aside, and that the defendant be ordered to pay the plaintiffs the proceeds of the estate. The court granted the relief prayed. The defendant appeals.

Jas. R. McCrackin and *Leggett & McKemey*, for appellant.

Ratcliff & McCoy, for appellees.

DAY, CH. J.—The cause was submitted upon an agreed statement of facts, from which it appears that the Presbyterian church of Libertyville was organized and incorporated on the 28th day of May, 1855, and that it has kept up its organization, and exercised all the privileges and franchises of a corporation, to the present time. The plaintiffs insist that the corporate existence of the church in question ceased upon the lapse of twenty years from the date of its incorporation, to wit, on the 28th day of May, 1875. The plaintiff-

iffs rely for this position upon Code of 1851, section 681; Revision, section 1158; Code of 1873, section 1069. This section is as follows: "Corporations for the construction of any work of internal improvement may be formed to endure fifty years; those formed for other purposes can not exceed twenty years in duration; but in either case they may be renewed from time to time for periods not greater respectively than was at first permissible, provided three-fourths of the votes cast at any regular election for that purpose be in favor of such renewal, and provided, also, that those thus wishing a renewal will purchase the stock of those opposed to the renewal, at its fair current value." In the Code of 1851, the Revision, and the Code of 1873, this section occurs in the chapter on corporations for pecuniary profit. Section 708 of the Code of 1851 provides: "Corporations for the establishment of seminaries of learning, churches, lyceums, libraries, agricultural societies, and for other lawful purposes unconnected with motives of pecuniary profit, may be formed in the manner directed in the preceding chapter, so far as applicable, and the provisions of that chapter are extended to them, except as herein modified."

Section 1187 of the Revision is the same, and section 1091 of the Code of 1873 is substantially the same. It is said by the appellants that section 681 of the Code is not applicable to corporations not formed for pecuniary profit, and that, consequently, by express provision of section 708, it does not apply to such corporations.

As now advised, this court is not agreed upon this question, and we do not deem its determination essential to a disposition of this case. The defendants insist that it is not necessary that the church in question should be incorporated, in order to take the benefits of the devise in question. The defendants rely upon *Miller v. Chittenden*, 2 Iowa, 315; s. c. 4 Id., 252; and *Johnson v. Mayne*, 4 Id., 180. The latter case is more directly in point. The doctrine of that case, and of the authorities which it cites and approves, is that, when there is a devise of real estate to a church or

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society incapable of taking the legal title simply because of not being incorporated, the devise is not void, and the estate devised does not descend unincumbered to the heirs, but a trust is created for the benefit of the church, and the legal title devolves upon the heirs charged with the trust, which they will be required to execute; or a court of equity will appoint a trustee to execute the trust until the society becomes incorporated and acquires capacity to hold the legal title. We think this case announces the correct doctrine. It follows that the plaintiffs are not entitled to have the devise declared void, and the estate vested in them, even if the church in question was not an incorporated body.

II. Section 1101 of the Code of 1873, which is found in the chapter upon corporations other than for pecuniary profit, provides: "Any corporation formed under this chapter shall be capable of taking, holding or receiving property by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, but no person having a wife, child or parent shall devise or bequeath to such institution or corporation more than one-fourth of his estate, after the payment of his debts, and such devise or bequest shall be valid only to the extent of such one-fourth. The plaintiffs insist that, as Mary Byers left children, the devise can in no event be enforced to the extent of more than one-fourth of her estate. Upon the other hand, the defendants insist that the church in question was not incorporated under the chapter referred to in section 1101, and that, therefore, that section does not apply. It would be anomalous if a church by refusing to incorporate could evade the provisions of that section. The section refers to such institution or corporation. The words, "such institution," we think, refer to the associations named in section 1091 of the Code, and such associations, whether incorporated or not, it seems to us, can not take by will more than one-fourth of the estate of a testator, who leaves a wife, child or parent. Because the court held the will wholly void, the judgment is

REVERSED.

STATE V. SHOEMAKER.

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1. **Bastardy:** ADOPTION OF CHILD BY ANOTHER MARRYING THE MOTHER.

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One who marries a woman known by him to be *enceinte* is regarded by the law as adopting the child into his family at its birth, and he becomes liable for its support as a parent, and an action against the natural father for its support as a bastard will not lie. But this rule of adoption does not apply in cases involving questions of heirship and inheritance.

Appeal from Wapello District Court.

MONDAY, DECEMBER 10.

THIS is a proceeding under chapter 56, Title 25, of the Code, to charge defendant with the support of a bastard child. The case was tried to a jury and, upon the evidence introduced by plaintiff, the court directed the jury to find for defendant, which was done. Plaintiff appeals.

H. B. Hendershott, Samuel Jones and Smith McPherson,
Attorney-general, for the State.

Stiles & Beaman, for appellee.

BECK, J.—I. The undisputed testimony as disclosed by the evidence for the state established the following facts:

1. The child was begotten by the defendant, and was born on the 13th day of August, 1882. 2. Prior to its birth, on the 1st day of June, 1882, the mother, the prosecutrix, married another man named Getz. 3. At and before the marriage, Getz was informed by the prosecutrix that she was *enceinte*; her condition was apparent from her appearance. Upon these facts, the district court held that plaintiff could not recover, and directed the jury to return a verdict for defendant.

II. Under chapter 56, Title 25 of the Code, a father may be charged with the maintenance of his illegitimate child. The proceeding thereunder is entitled as an action in the

name of the state against the alleged father, and may be prosecuted upon the complaint of the mother. It is a civil action of a summary nature, (*Holmes v. The State*, 2 G. Greene, 501; *Black Hawk County v. Cotter*, 32 Iowa, 125,) and is intended to secure the maintenance of the bastard, to the end that in no event shall the public become chargeable therewith. Of course, if one stands in the relation to the child which will cause the law to esteem him liable as its father for its support, being in *loco parentis*, the proceeding cannot be prosecuted against another who is in fact the natural father. The one whose relations are such that he stands in *loco parentis* the law esteems the father, and will not, for various reasons, enquire by whom the child was begotten. One who marries a woman known by him to be *enceinte* is regarded by the law as adopting into his family the child at its birth. He could not expect that the mother upon its birth would discard the child and refuse to give it nurture and maintenance. The law would forbid a thing so unnatural. The child, receiving its support from the mother, must of necessity become one of her family, which is equally the family of the husband. The child, then, is received into the family of the husband, who stands as to it in *loco parentis*. This being the law, it enters into the marriage contract between the mother and the husband. When this relation is established, the law raises a conclusive presumption that the husband is the father of his wife's illegitimate child. We must not be understood to hold that this rule prevails in cases involving questions of heirship and inheritance. In these cases the rights of others besides the husband and bastard arise. In this case, the rights and liabilities of the husband and child are alone involved; they rest upon the relations which impose upon the husband the duty of maintaining the child. Our conclusion is supported by public policy, and considerations which work for the peace and well being of families. A husband who, in the manner we have indicated, has put himself in *loco parentis* of a bastard child of his wife, ought not to be permitted to

disturb the family relation, and bring scandal upon his wife and her child, by establishing its bastardy, after he has condoned the the wife's offense by taking her in marriage.

III. The conclusion we reach in this case is supported by *The State v. Romaine*, 58 Iowa, 46, and cases therein cited.

IV. Many of the cases cited by defendant's counsel, (*Wright v. Hicks*, 15 Ga., 160; *Cross v. Cross*, 3 Paige Ch., 139; *Goodright v. Saul*, 4 Tenn., 356; *Lomax v. Holmden*, 2 Strange, 940; *Hull v. Commonwealth*, Hardin, (Ky.), 486; *State v. Petaway*, 3 Hawks, 623; *Commonwealth v. Wentz*, 1 Ashm., 269; *The King v. Inhabitants of Kea*, East, 132; *The King v. Inhabitants of Maidstone*, 12 East, 550; *Shelly v. ———* 13 Ves., 56; *State v. Broadway*, 69 N. C., 411; *Stegall v. Stegall's Adm'r*, 2 Brock., C. C., 256,) involve questions of heirship or inheritance, and, in this respect, differ from the case before us. The distinctions between those cases and this, based upon this ground, are obvious. We have above pointed them out. Other cases cited by counsel are also distinguished by these facts from this case. It is our conclusion that the judgment of the district court ought to be

AFFIRMED.

PERKINS V. JONES ET AL.

- I. **Practice: DISMISSAL OF ACTION: ESTOPPEL.** Where defendants procured the dismissal of a cause in one court upon the ground that it was properly pending in the court of another county to which it had been transferred, *held* that they could not afterwards be heard to say that the court of the other county had no jurisdiction of the cause, and no right to remand it.

Appeal from Cass Circuit Court.

MONDAY, DECEMBER 10.

THE plaintiff appeals from an order of the court striking

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the cause from the docket. The facts are stated in the opinion.

Temple & Phelps, for appellant.

L. L. De Lano, for appellees.

DAY, CH. J.—The plaintiff brings this action for the recovery of damages for the alleged unlawful sale by the defendants of intoxicating liquors to plaintiff's husband. At the April term, 1880, of the Cass circuit court, a trial was had to a jury, and resulted in a verdict for plaintiff for \$550. The defendants filed a motion for a new trial, and thereupon the plaintiff filed a motion for change of venue, grounded upon the alleged prejudice of the judge. The court refused to entertain the motion for a new trial, and ordered that the venue be changed to the Adair circuit court. The defendants appealed, and this action of the court was reversed. See 55 Iowa, 211. The cause being remanded to the Cass circuit court, the motion for new trial was submitted and sustained. At the same time, the motion for a change of venue which had been before filed, without being resubmitted or urged by either party, was again sustained, and the venue was changed to the Adair circuit court. After this change was ordered, the plaintiff did not make any arrangement with the clerk, or pay, or tender payment, for a transcript, nor did the clerk forward a transcript in said cause to Adair county, but a copy of the order for a change was attached to the papers in the case, with the clerk's certificate attached, and delivered to defendants' attorneys, and by them filed in the Adair circuit court on the fourth day of August, 1881. This court convened August 1, 1881, and on the fifth of August the defendants appeared and demanded a trial, and, the plaintiff failing to appear, the court ordered that the cause be stricken from the docket at the plaintiff's costs. Neither the clerk, nor the plaintiff, nor her attorneys, knew that the transcript had been sent to, or filed in, the Adair cir-

cuit court, until after this judgment had been rendered. The plaintiff subsequently appeared in the Adair circuit court and filed a motion for a new trial, and asked that the judgment of the court be set aside, canceled, and declared of no effect, and the cause be remanded to the circuit court of Cass county for trial. Pending this motion, the cause was by agreement continued at the February term, 1882, of the Adair circuit court. The cause appearing upon the docket of the April term, 1882, of the Cass circuit court, the defendants filed a motion to dismiss the cause, for the following reasons: "For that, at the April term, 1881, of this court, an order was made upon the plaintiff's motion, changing the place of trial from this county to the circuit court of Adair county, Iowa, and, at the August term, 1881, of the said Adair county circuit court, said cause came on for hearing and trial, and was by said court dismissed, as is shown by the certified copy of the record of the proceedings of the said court in said cause, which is hereto annexed as a part hereof, and is marked exhibit 'A,' and a petition for a new trial is now pending in said Adair circuit court in said cause." The court sustained this motion, and ordered that the cause be stricken from the calendar and dismissed. At the August term, 1882, of the Adair circuit court, the plaintiff's petition to set aside the order and judgment of dismissal came on to be heard, and was sustained, and it was ordered that the cause be remanded to Cass county. At the April term, 1883, the cause appeared upon the docket of the Cass circuit court, and the defendants filed a motion to strike the cause from the docket, in substance as follows: "That this cause was on the motion of the defendants, at the April term, 1882, dismissed and stricken from the docket, and fully and finally disposed of; and this is not a new action, but a redocketing of the same action in the same court, without the service of any new process." The court sustained this motion, and from this order the plaintiff appeals. It thus appears that the plaintiff, without any fault upon her

part, between the actions of the Cass and Adair circuit courts, by a sort of legal legerdemain, is out of court, notwithstanding that she has a cause of action upon which a jury has once found in her favor. It is clear, from the motion filed at the April term, 1882, of the Cass circuit court, that the defendants procured the dismissal ordered at that term, upon the ground that the cause was properly pending in the Adair circuit court, and, consequently, could not be pending in the Cass circuit court. Having obtained the advantage of that position, the defendants now change base entirely, and claim that the Adair circuit court never acquired jurisdiction of the cause, that its order remanding it to the Cass circuit court was a nullity, that the only jurisdiction of the cause was in the Cass circuit court, and that its order of dismissal, not appealed from, effectually disposed of the case. The defendants cannot be permitted to rely upon positions so entirely contradictory and inconsistent, for the purpose of defeating the plaintiff's cause of action. The defendants, having procured a dismissal of the cause in the Cass circuit court, upon the ground that it was properly pending in the Adair county court, are now estopped from denying the jurisdiction of the Adair circuit court. The Adair circuit court assumed jurisdiction of the action pursuant to the request of the defendants, and, for the purposes of this case, so far as the defendants are concerned, the jurisdiction of that court must be conceded. The plaintiff, also, submitted herself to the jurisdiction of the Adair circuit court, when she asked an order remanding the cause to the Cass circuit court. The order remanding the cause to the Cass circuit court transferred it to that court and, thereafter it was properly pending there. The court erred in dismissing the cause.

REVERSED.

MITCHELL V. HARCOURT ET AL.

1. **Attachment: COUNTER-CLAIM FOR DAMAGES: EVIDENCE.** Upon a counter-claim for damages for the wrongful suing out of an attachment, evidence that the credit of the defendants was impaired by the attachment not admissible. *Lowenstein v. Monroe*, 55 Iowa, 82, followed.
2. **Evidence: MUST BE APPLICABLE TO ISSUES.** Evidence tending to establish a counter-claim not pleaded is not admissible.
3. **Attachment: TENDER: ADMISSION OF AMOUNT DUE.** Where before the trial of an attachment suit the defendants tendered and paid into court a sum of money for the plaintiff, this was a conclusive admission that that amount was due when the attachment was sued out.
4. ———: **COUNTER-CLAIM FOR DAMAGES: EVIDENCE OF EMBARRASSED CONDITION OF DEFENDANT.** Upon a counter-claim for damages for the malicious suing out of an attachment, evidence that the defendant in attachment was greatly involved in debt was admissible, as tending to show that plaintiff was not actuated by malice.
5. **Practice in Supreme Court: REVIEW OF ORDER EXCLUDING QUESTION TO WITNESS: RULE STATED.** The action of the trial court in excluding a question propounded to a witness will not be reviewed, unless it is made to appear of record what evidence was sought to be elicited by the question. If this appears from the question itself, it is sufficient; if not, the party propounding the question must state what he expects to prove.

Appeal from Pottawattamie Circuit Court.

MONDAY, DECEMBER 10.

ACTION on promissory notes. An attachment was sued out. The defenses were that there was no consideration for the notes and that they were usurious. A counter-claim was pleaded, claiming damages on the ground that the attachment had been wrongfully and maliciously sued out. Trial before a jury, verdict for the defendant, and plaintiff appeals.

Flickinger Bros., for appellant.

Sapp & Lyman, for appellees.

SEEVERS, J.—I. The grounds upon which the attachment

was sued out were, that one of the defendants was about to convert a part of his property into money for the purpose of placing it beyond the reach of his creditors, and that one of the defendants was about to dispose of his property with intent to defraud his creditors. The only property attached consisted of real estate. Against the objection of the plaintiff, the defendants were permitted to show that their credit had been injuriously affected by the attachment.

The admission of this evidence constitutes error. *Lowenstein v. Monroe*, 55 Iowa, 82. The court, however, instructed the jury that nothing could be allowed because defendants' credit was impaired by the attachment. Whether this cured the error, we do not determine.

II. Evidence was introduced by the defendants tending to show that the plaintiff boarded with one of the defendants, or obtained his meals there for a time. As no such counterclaim was pleaded, we think the evidence inadmissible. As we understand, counsel for the appellee insist that the evidence had some bearing on the question of usury, but we cannot think this is so. Of course it was competent to show the prior transactions between the parties, because these notes were renewals of others given at the inception of the usury as claimed. But the fact that the plaintiff boarded with the defendants, or frequently took his meals there, had no bearing whatever on the question of usury.

III. The defendants, prior to the trial, tendered and paid into court for the plaintiff upwards of one hundred dollars on the indebtedness sued on. This is a conclusive admission that the amount tendered was due when the attachment was sued out. Yet it is claimed by counsel for the appellee that the jury found that the attachment was maliciously sued out, and this we think is so, from the amount of damages awarded the defendants. The plaintiff asked one of the defendants, when on the stand as a witness, a question in the following words: "How much did you owe?" and also other questions, so framed as to elicit the amount the defendants were indebt-

ed at the time the attachment was sued out. This evidence was objected to as immaterial and not proper cross-examination, and the objections sustained. The latter objection is not now insisted on, but it is said that the evidence sought to be introduced would not tend to establish that the grounds stated in the petition asking the attachment were true. It may be that this is so; but we think the evidence was admissible as bearing on the question of malice. If the defendants were largely in debt, taking into consideration the amount of property owned by them, and the plaintiff had information of such fact, which as a reasonably prudent person he was warranted in believing when he procured the attachment, such evidence would, we think, have a tendency to show that he was not actuated maliciously in suing out the attachment. But counsel for the defendants insists that the error cannot be corrected, because it does not appear what the plaintiff expected to prove by the witness, and *Shellito v. Sampson*, 61 Iowa, 40, is relied on to support this objection. But we think it sufficiently appears from the question asked what was expected to be proved. The true rule, we think, is that, when it is apparent on the face of the question asked the witness what the evidence sought to be introduced is, and that it is material, this is sufficient. But when this is not apparent, then the party seeking to introduce the evidence is required to state what he expects to prove, and thus make its materiality appear.

REVERSED.

MITCHELL V. MCHENRY ET AL.

1. **Promissory Note: CHANGE OF TIME OF PAYMENT: STATUTE OF LIMITATIONS.** Where one of the makers of a note, several months after its execution, with the oral consent of his co-makers, made and signed an indorsement on the back of the note, whereby it was to become due at a date earlier than that named on its face, *held* that the indorsement was the act only of him who made it, and that the co-makers who consented to his making it did not become parties thereto in such sense as to cause the statute of limitations to run against the note, as to them, from the date named in the indorsement.

Appeal from Crawford District Court.

MONDAY, DECEMBER 10.

ACTION upon a promissory note for \$500, signed by the defendants, Morris McHenry, Hugh McWilliams, R. Hefelfinger and H. C. Laub. The note was made payable September 1, 1873. The action was commenced December 27, 1882. The defendants pleaded that the note was barred by the statute of limitations, except as to \$100, setting out a certain agreement by which they averred that the time of payment was changed, and made earlier than by the terms of the note, except as to \$100. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff for \$161.65 only, and he appeals.

Glass & Hughes and Garrison & Roberts, for appellants.

Connor & Shaw, for appellees.

ADAMS, J.—The note was executed October 20, 1868. In February, 1869, one of the defendants, Morris McHenry, made a writing upon the back of the note in these words: "It is understood and agreed that \$200 of this note are to be paid in 1869, and \$100 in each year thereafter.

"Signed, MORRIS MCHENRY."

All the defendants, including those who did not sign this

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writing, now set up the same as being binding upon all, and causing the note to so mature, (except as to \$100,) as that the same (except as to \$100) is now barred by the statute of limitations. The defendants other than McHenry seek to connect themselves with the writing by an averment in their answer in these words: "He (McHenry) executed said agreement with the knowledge and consent of all the defendants in this action." The plaintiff filed a reply, admitting that McHenry made the written agreement set out, and that the other defendants knew of his making it, and consented to it; but denied that the agreement is the contract of any of the defendants except McHenry. Upon the issues thus made, the case was submitted without evidence, and the court gave an instruction in these words: "I am of the opinion that the legal effect of the writing on the back of the note (the same being there as admitted with the knowledge and consent of the defendants) was to modify the contract as to the time when the money contracted to be paid was to be paid." The court further instructed, in substance, that two of the defendants were liable for only \$100 and interest, and that the other two were liable only for that amount, unless the jury should find that the latter had revived their liability by a promise in writing. The ruling of the court is assigned as error.

If this indorsement had been written upon the note at the time it was executed, it might perhaps be taken as a part of the original contract, and all the signers of the note be taken as parties to it, because a part of the original contract. But the indorsement was made several months after the execution of the note. If the defendants other than McHenry became parties to it, they did so by reason of the fact admitted in the plaintiff's reply, that they knew of McHenry's making the writing, and consented to his making the same.

The agreement, as it appears in writing, is of course the agreement only of McHenry. It does not even show that there was an intention that it should be signed by any one but him. The most that can be said is that, so far as the

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body of it is concerned, it might have been drawn with the intention that it should be signed by the others. But, whatever we might think of it in this respect, we do not think the instruction can be sustained. The consent admitted by the reply, it appears to us, did not go further than that McHenry should do what he did, and that is, make the indorsement precisely as it appears; and that, as we have seen, construed by its own terms, cannot bind any one but McHenry. It is true that McHenry did not need the others' consent to enable him to make such indorsement; but we can conceive that that was all that he asked, and all that they gave, and that they gave it for the reason that they did not regard themselves as affected by it.

Besides, it appears to us that, where a person has nothing to do with a writing except to verbally consent to it, he cannot be regarded as making himself a party to it. His verbal consent might amount to an agreement, but it would be a verbal agreement, and not a written one. It may be that the defendants other than McHenry made a verbal agreement, but they do not so aver, nor does the instruction proceed upon such theory. In our opinion the judgment must be

REVERSED.

BAILEY V. THE UNION PACIFIC R'Y CO., GARNISHEE.

1. **Garnishment: APPEARANCE IN COURT: CORPORATION AGGREGATE.** The provisions of sections 2979, 2980 of the Code, requiring a garnishee to appear in court and answer interrogatories, cannot, in the nature of things, apply to a corporation aggregate; and it is competent for such corporation to answer in writing through some officer or agent authorized to do so, and cognizant of the facts.
2. **Assignment of Account: PAYMENT TO ASSIGNOR WITH NOTICE: RIGHTS OF PARTIES.** While it was held in *Wing v. Page*, ante, p. 87, that payment to the assignor of an open account, after notice of the assignment, is a good defense to an action by the assignee, yet the assignee could not, after the assignment, compel payment to him.

3. **Garnishment:** LIABILITY OF GARNISHEE ON ACCOUNT PREVIOUSLY ASSIGNED BY THE DEFENDANT. A garnishee can not be held liable on an account owing to the principal defendant, when the account was assigned, and the garnishee had notice of the assignment, at the time of the service of the garnishment.

Appeal from Superior Court of Council Bluffs.

MONDAY, DECEMBER 10.

THE plaintiff commenced an action against J. S. Bailey upon a promissory note, and caused a writ of attachment to issue thereon, on the ground that said Bailey was a non-resident of the state, and on the 7th day of February, 1883, the Union Pacific Railway Company was attached as garnishee, and cited to appear and make answer on the 12th day of February, 1883. On the 14th day of February, 1883, the garnishee defendant filed an answer as follows: "Comes now the Union Pacific Railway Company, garnishee, and for answer says: That for the following reasons it is not indebted to J. S. Bailey, and has no money or property in its possession, or under its control, belonging to him. That prior to the service of this garnishment herein, to wit, on or about the 12th day of January, 1883, the said defendant sold and assigned his salary earned, and to be earned, for the months of January and February, and to and including July 15, 1883, to one John L. Owen, and caused this garnishee to be notified of that fact. The said assignee claims and demands said money, and a payment thereof into this court will not release this garnishee from its legal obligation to said assignee. Wherefore garnishee asks to be dismissed with costs.

"State of Iowa, Douglass County, ss.

"J. S. Shropshire, being duly sworn, deposes and says that he is authorized to answer for garnishee; that he has read the foregoing answer, and knows the contents thereof, and that the facts therein stated are true, as he believes.

"J. S. SHROPSHIRE."

"Sworn to before me and signed in my presence this 13th day of February, A. D. 1883. LEAVITT BURNHAM,

"Notary Public."

On the 3rd day of March, 1883, the plaintiff filed a motion to strike the defendant's answer from the files, upon the following grounds:

"1. They (said garnishee) have been served with notice to appear, and they have received their fee for appearing.

"2. That their answer implies an indebtedness, and the garnishee can not set up a defense for a third party.

"3. That garnishee has not appeared in court and made answer as required by law.

"4. That their answer sets up a defense of a third party."

The court sustained this motion, and the garnishee excepted. On the 26th of March, 1883, the garnishee filed an amended answer, as follows:

"That said garnishee defendant was a corporation duly organized and existing under and by virtue of the laws of the United States; that at the date of the service of this garnishment it was not indebted to said defendant, J. S. Bailey, for the reason that the said Bailey had sold and assigned his wages, salary earned and to be earned by him, for the months of January, February, March and April, 1883, to one J. L. Owen, of Omaha, Nebraska, and had notified this garnishee to pay his salary to said assignee, who now claims and demands the same; that said garnishee has no other money or property in its possession, or under its control, belonging to said Bailey, and knows of no one who has. Garnishee says that the said assignee has not been made a party to this suit, and has had no notice of the pending thereof. Wherefore garnishee asks to be discharged with its costs.

"J. S. SHROPSHIRE."

"J. S. Shropshire, being duly sworn, says that he is authorized to answer for the garnishee herein; that he is familiar with the facts, and, from the nature of his business connections with said garnishee, is more familiar with the facts

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than any other officer or employe; that he has read over the foregoing answer and knows the contents thereof, and that the facts therein stated are true, as he believes.

"J. S. SHROPSHIRE."

"Sworn to before me and signed in my presence this 24th day of March, 1883. Witness my hand and seal notarial."

"GEORGE F. WRIGHT,

"Notary Public."

The plaintiff filed a motion to strike this answer from the files for the following reasons:

"1. That said matter set up in said answer is immaterial, incompetent and irrelevant.

"2. The garnishee defendant has failed to appear and make answer as required by law.

"3. That the garnishee defendant has not appeared and answered the interrogatories to be propounded to it.

"4. That the answer herein on file is not a complete answer to the interrogatories to be propounded to it.

"5. That the assignment set out in said answer is not claimed to have been made prior to the service of the garnishment process."

On the seventeenth day of April, 1883, this motion was sustained. On the tenth day of June, 1883, the plaintiff filed a motion for judgment against the garnishee in the sum of \$384.10, and the court ordered "that defendant garnishee appear in court by June 12, 1883, at 10 o'clock A. M., and answer, and upon default judgment be rendered as prayed." On the twenty-second day of June, judgment was rendered against the garnishee for \$384.10. The garnishee appeals.

Wright & Baldwin, for appellant.

Lindt & Hart, for appellee.

DAY, CH. J.—I. It is not stated, as a ground of the motion to strike the answer from the files, that it does not appear that Shropshire was authorized or was competent, as an

officer or agent, to answer on behalf of the company. The ground of the motion seems to be that it is not competent for the garnishee to answer in writing at all, but that it must appear in court and submit to an oral examination, and answer orally such questions as may be propounded. The Code provides that, except when the plaintiff in writing directs the sheriff to take the answer of the garnishee, he must be required to appear on the first day of the next term of the court in which the case is pending, and answer such interrogatories as may be propounded to him, or he will be liable to pay the entire judgment which the plaintiff eventually obtains against the defendant. Code, § § 2979 and 2980. This provision cannot apply literally to the case of a corporation aggregate, "an artificial being, invisible, intangible, and existing only in contemplation of law." Such a being can not come personally into court and submit to an oral examination. The end of the statute must, therefore, be accomplished in some other manner. In our opinion it must be held competent for such a corporation to answer in writing through some officer or agent authorized by the company to do so, and cognizant of the facts. For a full discussion of this question, see opinion of the Illinois supreme court in *Chicago, Rock Island & Pacific R'y Co. v. Mason*, 11 Bradwell, 525. If issue be taken upon the answer so filed, then the plaintiff may summon any officer or agent of the company, and examine him as a witness.

II. It is stated, however, in the answer, that the matter set up in the answer is immaterial, incompetent and irrelevant. The answer, in substance, sets up the assignment to Owen of the debt due to Bailey, and that the garnishee owes the debt to Owen and not to Bailey. It is true, it was held by this court in *Wing v. Page*, *ante*, page 87, that payment to the assignor of an open account, after notice of the assignment, is a good defense to an action thereafter instituted upon the account by the assignee. This decision is based upon the peculiar provisions of sections 2086 and

Cassady v. Hammer.

2087 of the Code. But, while the debtor may voluntarily pay to the assignor, and thus avoid liability to the assignee, we think that he is not under obligation to do so, and that the assignor can not compel him to make such payment. The answer of the garnishee simply sets up a state of facts showing that the garnishee is not under legal liability to the judgment debtor. This we think it is competent for the garnishee to show.

III. A further ground of the motion to strike the answer from the files is that the assignment set out in the answer is not claimed to have been made prior to the service of the garnishment process. This ground of the motion is clearly based upon a misapprehension of the amended answer. It alleges "that at the date of the service of this garnishment it was not indebted to said defendant, J. S. Bailey, for the reason that the said Bailey had sold and assigned his wages." This clearly is equivalent to an allegation that, when the attachment was served, Bailey *had* assigned his wages. In our opinion the court erred in striking the answer of the garnishee from the files.

REVERSED.

CASSADY V. HAMMER.

1. **Taxes: MEANING OF TERM.** An agreement in a lease "to pay all taxes assessed * * * during the continuance of the lease" includes special assessments for local improvements, such as for paving and curbing the adjacent street.

Appeal from Polk Circuit Court.

MONDAY, DECEMBER 10.

ACTION for damages alleged to have been sustained by reason of the breach of a contract. The plaintiff leased to

62	359
97	296
62	359
112	320
62	359
141	22

the defendant certain real estate, situated on Walnut street, in the city of Des Moines. In the lease, the defendant agreed "to pay all the taxes assessed against the lot, and improvements erected on it, during the continuance of the lease, to-wit, for the years 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889." The city ordered that the street be curbed and paved; and it made a special assessment upon the lot to pay for the same. The defendant refused to pay the assessment, and the plaintiff, to relieve his lot from liability, paid it; and he now brings this action to recover the amount thereof from the defendant. The plaintiff in his petition sets out the facts substantially as above stated. The defendant demurred to the petition. The court overruled the demurrer, and the defendant electing to stand on his demurrer, judgment was rendered for the plaintiff. The defendant appeals.

Barcroft, Bowen & Sickmon, for appellant.

Berryhill & Henry, for appellee.

ADAMS, J.—The question presented arises upon the meaning of the word "taxes," as used in the lease. The defendant insists that, while it is true that he became obligated to pay all taxes, etc., the word "taxes" as used does not include special assessments for local improvements like the one in question.

The assessment was made under section 466 of the Code. In that section the assessment is denominated a special tax, and that section was in force at the time the lease was made. As tending also to fix the meaning of the word, though not perhaps to the same extent as the statute, we may refer to the fact that an assessment like the one in question has been called a tax in the decisions of this court. *B. & M. R. R. Co. v. Spearman*, 12 Iowa, 112; *Morrison v. Hershire*, 32 Id., 271; *City of Sioux City v. Ind. School District*, 55 Id., 150. The term special tax, as denoting an assessment for a local improvement, has, we

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think, come into very general use, and is understood by every one. We are aware that it has been held that a statute providing for the exemption of a certain class of property from taxation does not exempt from assessment for local improvements. An exemption from taxation being an exception, it is strictly construed.

The defendant cites and relies upon *Love v. Howard*, 6 R. I., 116, and *Municipality No. 2 v. Curell*, 7 La., 203. Those were cases where a lessee agreed to pay taxes, and it was held that he was not liable for a special assessment. But, in the former case, the assessment was made under a statute enacted subsequently to the execution of the lease. In the latter case, the agreement was to pay taxes annually levied, and it was held that the parties must have had in mind annual or general taxes.

The appellant insists that there is something in the lease in the case at bar tending expressly to show that the parties had in mind only annual or general taxes. It is said that the agreement was to pay the taxes "for the years 1880, 1881, &c." If this language stood alone, it might perhaps be regarded as favoring the defendant's position. But the agreement was to pay all the taxes "assessed during the continuance of the lease," and the years seem to be mentioned as describing merely the term.

It is not unfair to presume that, as this property was leased to the defendant before the street was improved, the rent was graduated somewhat with reference to the street's unimproved condition. If this is so, the defendant might properly enough, and especially in view of the length of his lease, agree to pay any special tax that might be assessed; and, when he agreed to pay "all taxes assessed," it seems to us that it should be held that he intended to include special taxes. As supporting the view which we have expressed, see *Blake v. Baker*, 115 Mass., 188.

AFFIRMED.

TUTTLE, LIVINGSTON & CO. v. THE PHOENIX INS. CO.

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| 62 | 362 |
| 86 | 106 |
| 63 | 362 |
| 89 | 710 |
1. **Bill of Exceptions: SKELETON: IDENTIFICATION OF EVIDENCE.**
In a skeleton bill of exceptions, it is necessary for the judge to identify the evidence in such manner that a mistake of the clerk in relation thereto can readily be corrected, and evidence not so identified will be stricken out in this court upon motion.
 2. **Practice: DEMURRER WAIVED BY ANSWER.** Any error in the overruling of a demurrer to a petition is waived by the filing of an answer.

Appeal from Woodbury Circuit Court.

MONDAY, DECEMBER 10.

ACTION on a policy of insurance against loss by fire. Trial by jury; verdict and judgment for plaintiff; and defendant appeals.

E. E. Lewis, for appellant.

Joy & Wright, for appellee.

SEEVERS, J.—There was submitted with the case a motion to strike out the evidence, because the same is not properly identified and preserved by a bill of exceptions.

In an amended abstract, to which there is no denial, the bill of exceptions is set out in full. It is recited therein that “the plaintiffs, to maintain the issue upon their part, introduced the following evidence, objections to which, and the rulings of the court thereon, and the exceptions of the defendant then and there, are noted in the following record in said evidence: (here follows plaintiff’s evidence.) And the defendant, to maintain the issues on its part, introduced the following evidence, the rulings of the court, and the exceptions of the plaintiffs and the defendant then and there made and appearing in the course of such evidence.” (Here follows defendant’s evidence.) The bill of exceptions is a

skeleton bill. The evidence was not, at the time the bill was signed, set out therein, and it is only referred to and identified in the manner above stated. Clearly, we think, the evidence is not sufficiently identified. In fact, it is not identified in any manner whatever. No directions are given the clerk as to what evidence shall be inserted in the bill and set out in the transcript. It leaves the clerk at his will and pleasure to insert whatever he may see proper. The clerk does not have any such power, but the trial judge must, in some sufficient manner, identify the evidence, so that a mistake of the clerk in relation thereto can be readily corrected. But it is useless to discuss the question under consideration, because it has been determined adversely to the appellants in *Hill et al. v. Holloway*, 52 Iowa, 678; *Wells v. B., C. R. & N. R. Co.*, 56 Id., 520.

Following these cases, the motion to strike out the evidence must be sustained. This being done, there is nothing left in the record but the pleadings, instructions, and, possibly, sufficient exceptions to the latter.

II. The defendant demurred to the petition, and the demurrer was overruled. This action of the court is assigned as error, but the defendant waived the error, if it was one, by answering the petition. As the evidence is not before us, we cannot say that the instructions, conceding that they were properly excepted to, are erroneous; and this is true as to the instructions refused. *Reed v. Mason*, 14 Iowa, 541; *Shepherd v. Brenton*, 20 Id., 41.

AFFIRMED.

STAPLES V. PLYMOUTH COUNTY.

1. **Board of Health: POWER TO BIND COUNTY FOR MATERIALS FOR A PEST HOUSE.** Under the provisions of chapter 151, Acts of the Eighteenth General Assembly, the board of health of a city has power to bind the county to pay for materials used under the direction of such board to build a pest house to prevent the spread of a contagious disease; and it would seem that the cost of such house, being incurred for the public good, could not be charged to the infected person or persons confined therein.
2. **Practice in Supreme Court: OBJECTION TOO LATE.** The insufficiency of a petition in a law action cannot for the first time be raised in this court.
3. **Statutes: REPEAL OF BY ENACTMENT OF CODE OF 1873.** All public and general statutes passed prior to the enactment of the Code of 1873, and not re-enacted, were repealed thereby; (Code § 47;) and § 8, chapter 107, Acts of the Eleventh General Assembly was thus repealed.

Appeal from Plymouth District Court.

MONDAY, DECEMBER 10.

ACTION to recover for the value of certain lumber furnished by plaintiff upon the request of the board of health of the city of LeMars and the overseer of the poor, which was used in building a pest house necessary for the proper care of certain persons found in the city afflicted with the small pox. A demurrer to the petition was sustained, and the plaintiff standing upon the petition, judgment was rendered against him. He now appeals.

G. W. Argo and *T. P. Murphy*, for appellant.

J. C. Kelly, for appellee.

BECK, J.—I. The petition alleges that a large number of persons residing in Le Mars being sick of small pox, and others being exposed to the contagion, and the welfare and safety of the people demanding that they should be removed

to a building apart from the other inhabitants, to prevent the spread of the contagion, the board of health of the city, being unable to procure such a building, proceeded to erect a suitable hospital, wherein the small pox patients should be kept and treated. The lumber in question was furnished by plaintiffs upon the request of the board of health and the overseer of the poor, and used in erecting the hospital. It is shown that the account for the lumber was approved by the board of health, and presented to the supervisors of the county, and rejected by them.

The demurrer is upon the grounds: 1. That the defendant is not authorized by law to erect hospitals, and cannot be made responsible therefor. 2. That the board of health of the city and the overseer of the poor are not authorized by law to bind defendant by a contract for the lumber. 3. That defendant is not authorized by law to own or become indebted for hospitals or pest houses. 4. That the city, being alone authorized to erect such buildings, is liable for the cost thereof. No other grounds of demurrer are stated.

II. Under chapter 151, Acts of the Eighteenth General Assembly, § 13, the mayor and aldermen of each city, or the mayor and council of each incorporated town, constitute a board of health, and are clothed with authority prescribed by the act. This provision supersedes and repeals Code, § 525, which authorized the city councils to establish boards of health. The authority of the board of health is prescribed by the act, which, as to these matters, repeals Code, §§ 415-418, specifying the power of boards of health existing under the Code. We must, therefore, determine the authority of boards of health by consulting the act above cited. Section 21 provides that, "When any person coming from abroad, or residing in any city, town, or township within the state, shall be infected, or shall lately have been infected, with small pox or other sickness dangerous to the public health, the board of health of the city, town, or township where said person may be, shall make effectual provis-

ion, in the manner in which they shall judge best, for the safety of the inhabitants, by removing such sick and infected person to a separate house, if it can be done without damage to his health, and by providing nurses and other assistance and supplies, which shall be charged to the person himself, his parents, or other persons who may be liable for his support, if able; otherwise to the expense of the county to which he belongs."

This statute requires and authorizes the board of health to "make effectual provision, in the manner in which they shall judge best, for the safety of the inhabitants, by removing such sick and infected person to a separate house." The law contemplates the isolation of infected persons, and directs that "effectual provision" therefor shall be made by the board of health. This is demanded by humanity and has long been known to be the effectual method of arresting the spread of contagion. Public policy demands that the spirit of the statute shall be regarded and enforced. The board of health is authorized to do whatever is necessary in order to make "effectual provisions" for the isolation of infected persons. *The City of Clinton v. The County of Clinton*, 61 Iowa, 205. In order to isolate the patient, he may be removed to a separate house. If no suitable house may be had, or if a temporary pest house or hospital may be erected at less cost than the rent of such house, the board of health, in the exercise of wise discretion, may provide such temporary building. This they would be authorized to do in the exercise of these general powers under the section, for it is incidental thereto. They could not otherwise make "effectual provision for the safety of the inhabitants."

The expense of providing a place for isolating the infected person is a part of the expense incurred in rendering "effectual provision for the safety of the inhabitants," which the statute directs and requires, and, under the express language of the section quoted, such expenses are chargeable to the county.

III. It will be observed that such expenses are primarily chargeable to the infected person, and the county is only liable in case of his inability to pay them. The petition does not allege the inability of the persons sent to the hospital to answer for the expenses incurred. Counsel for defendant now insist that the petition is void on account of the absence of such allegation. But no such objection was raised by the demurrer, or in any other manner made, in the district court. It cannot be first presented here.

IV. A question may arise under the statute as to the liability of a solvent infected person to pay the expenses of erecting a hospital or pest house. As it is not presented in the case, we do not consider it. We may, however, suggest that such expense, which is incurred for the benefit of the inhabitants of the city by providing for the isolation of an uncertain number of infected persons, would with difficulty be apportioned to such as would be liable therefor, if indeed it could be done at all. Besides, it would be a great hardship upon the unfortunate subjects of infection to impose upon them the expense incurred, not for their own benefit, but for the benefit of the people. It would be quite as just to include in the estimates of the cost of keeping paupers or the insane the expenses of erecting poor houses or hospitals.

V. Counsel for defendant insists that chapter 107, Acts of the Eleventh General Assembly, section 8, which authorizes boards of health to establish pest houses and hospitals, is not repealed by chapter 151 of the Acts of the Eighteenth General Assembly, above referred to, and is, therefore, still in force. We think differently. The last named act in express language (§ 25) repeals all prior acts in conflict with its provisions. The first charges the cities with the expense of providing pest houses; the last, as we have seen, holds the counties liable therefor. Here is a direct conflict. The last act prevails and the first is repealed. But, further than this, the subject of the act of the Eleventh General Assembly,

Rhoadabeck v. The Blair Town Lot and Land Co. et al.

which pertains to the establishing of boards of health and their duties and powers, was revised by the Code of 1873, and the provisions of the eighth section are not re-enacted. It is, therefore, repealed. Code, § 47. See also §§ 415-420, 525.

It is our conclusion that the district court erred in sustaining the demurrer. Its judgment is therefore reversed, and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

RHOADABECK V. THE BLAIRE TOWN LOT AND LAND CO. ET AL.

1. **Practice in Supreme Court: CASE CONSIDERED AS MADE BELOW.**

Where, without objection on the part of any one, the sufficiency of a petition was tried below upon a motion to strike it out, instead of upon a demurrer, and the cause is in the same way presented here on appeal, it will be considered as presented, and tried upon its merits.

2. ———: **THEORETICAL AND CONTINGENT QUESTIONS NOT CONSIDERED.**

Where the granting of an order was premature, on account of the pendency of another cause between the parties, the determination of which in appellee's favor would have rendered the order right, and it did not appear whether that cause had been tried or not at the time of the appeal, *held* that this court could not say that appellant was prejudiced by the issuance and execution of the order, and that it would not reverse the cause without a showing of prejudice.

Appeal from Harrison District Court.

MONDAY, DECEMBER 10.

THIS is an action to recover damages occasioned, as it is alleged, by an unlawful, wrongful and malicious removal of the plaintiff and his family from certain real estate. The defendants moved to strike out certain paragraphs from the petition as irrelevant and redundant, indefinite and uncertain, and as being mere conclusions of law. The motion was sustained, and the plaintiff appeals.

Jno. H. Keatley and J. C. Rhoadabeck, for appellants.

N. D. Parkhurst, for appellee.

ROTHROCK, J.—The material facts set forth in the petition, briefly stated, are as follows:

In 1870, the plaintiff entered and filed his application for pre-emption of the land in controversy. In 1880, a decree was rendered in the district court of Harrison county, in favor of the Blair Town Lot and Land Company, to the effect that the plaintiff had no right or title to the land. The plaintiff appealed from this decree to this court, and afterwards withdrew his appeal. On November 24, 1881, the plaintiff filed his petition in the court below, claiming that, under the occupying claimant law, he was entitled to the value of certain improvements put upon the land, to the amount of \$1400.

On the sixth day of May, 1882, the Blair Town Lot and Land Company caused a writ of removal to issue from the district court of Harrison county, and the same was placed in the hands of the defendant, Middleton, who was sheriff of the county, and the plaintiff and his family were by virtue of said writ removed from the land.

It is charged that the writ was obtained maliciously, that it was an abuse of the process of the court, that it was illegal and fraudulent, and that defendants well knew at that time that "plaintiff had filed his petition in said district court, demanding payment for his improvements upon said land under the occupying claimant law," and that defendants took possession of the land and refused to pay the plaintiff for his improvements.

Damages are claimed in the sum of \$5,000, and a writ of possession is asked, that plaintiff may be reinstated in the possession of the premises. By an amendment to the petition, \$3,000 is claimed as exemplary damages.

The defendant moved to strike out from the petition and

amendment thereto "all that part thereof set out in paragraphs from one to twelve inclusive." These paragraphs embrace the whole of the petition, including the prayer for relief, and leave nothing in the petition but its title. The effect of the ruling of the district court in sustaining the motion was, therefore, the same as if the paper attacking the petition had been a demurrer, upon the ground that the facts stated did not entitle plaintiff to the relief demanded. And the petition should have been attacked by demurrer and not by motion. But, as the parties have not presented this question of practice, but have argued the case upon the sufficiency of the petition to maintain an action, we will determine it upon its merits.

We think that the petition does not show a cause of action. Upon its face it shows that the defendant, the Blair Town Lot and Land Company, was entitled to a writ of removal, but for the petition under the occupying claimant law. It is not shown what if any disposition has been made of that claim. It is not stated that it is still pending and undetermined. For all that does appear, it may have been determined against the plaintiff. Again, if the writ was improperly issued, a motion to recall the same and reinstate the plaintiff in possession would have been, to say the least, a proper proceeding. And, in a trial of the plaintiff's claim for improvements, if it is still pending, all questions as to rents, use and occupation may be determined.

AFFIRMED.

STEEVER V. THE ILLINOIS CENTRAL R'Y CO.

1. **Contract: ILLEGAL: EXECUTED: PARTIES EQUALLY GUILTY.** Parties equally at fault, or equally violators of law, can have no remedy against each other based upon contracts or transactions which are esteemed unlawful. It was accordingly *held* that, where the agent of a railway company, in violation of chapter 68, Acts of the Fifteenth General Assembly, collected from himself, as a shipper of goods, a rate of freight in excess of that provided by law, and paid the same over to the company, he was, equally with the company, a violator of the law, and that he could not recover from the company the penalty provided in said act for such illegal charges. To be "equally guilty" in such a case does not imply the same degree of guilt, nor guilt subjecting the wrong doers to the same punishment, but only that both should be in fact partakers of the guilt.

Appeal from Sac Circuit Court.

TUESDAY, DECEMBER 11.

ACTION under chapter 68, Acts of the Fifteenth General Assembly, to recover the penalty therein provided for illegal charges paid by plaintiff to defendant on account of goods transported upon its railroad. The cause was tried to the court without a jury, and, upon facts found, judgment was rendered for plaintiff. Defendant appeals. The facts of the case are fully stated in the opinion.

J. F. Duncomb, for appellant.

Charles D. Goldsmith and Wright Cummins & Wright, for appellee.

BECK, J.—I. In the thirteenth count of defendant's answer, it pleaded the following defense. "Further answering, defendant says, that during all the time for which plaintiff claims over-charges he was the station agent of defendant, and was employed by the month as such station agent, and that, among other duties, it was his special duty to collect freight and pas-

62	371
80	555
62	371
86	611
62	371
120	520
62	371
136	87

senger charges at Alta, a station on defendant's line of road, and this suit is brought to recover back over-charges under chapter 68, Acts of the Fifteenth General Assembly of Iowa, and the amounts claimed are all for alleged over-charges under that law, on goods shipped by and to plaintiff while such station agent, and that if any of the charges complained of were over-charges collected by said plaintiff while agent of defendant, in violation of said law, and such charges were charged by said plaintiff in violation of said law, and said charges were demanded by said plaintiff in violation of said law, and said plaintiff, as such agent, was the agent of a corporation operating a line of railroad within this state, and the collection, receipt, demand for and charging of said sum claimed by plaintiff, is so charged, collected, received or demanded in violation of said law as claimed by plaintiff, was done by plaintiff as agent of said corporation, this defendant, and the doing of the said several acts, and of each of said several acts so done by plaintiff, was a criminal act, and each of said acts were criminal acts, and subjected plaintiff to fine or imprisonment for each of the several violations of said law at the discretion of the court, as provided by section 11 of said chapter 68 aforesaid, whereupon defendant says that the plaintiff is estopped from recovering back any portion of said over-charges, if any, so as aforesaid made by him as agent of said corporation, defendant, criminally, and by said act made a misdemeanor and punishable as aforesaid by fine or imprisonment." As the conclusions we reach upon the defense thus pleaded are decisive of the case, other allegations of the answer need not be recited. The circuit court found the facts applicable to this branch of the case in the following language: "The court further finds that, during all the time for which plaintiff claims over-charges herein, he was the station agent of defendant at Alta station, employed by the month as such agent, and that among other duties it was his special duty to collect freight and passenger charges at said station on defendant's line of road; that this action is brought to recover

over-charges under chapter 68 of the Acts of the Fifteenth General Assembly of Iowa; that the amounts claimed are all for over-charges under that law, for goods shipped by and to plaintiff while he was acting as such agent, and that all of such over-charges were paid over by said plaintiff, while acting as the agent of defendant, to defendant."

The circuit court's conclusion of law upon the facts thus found is expressed by the record as follows: "Upon the sixth finding of fact the court finds the legal conclusion that, upon the facts therein found, the acts of the plaintiff in collecting and remitting such charges against himself, while acting in the capacity of agent for the defendant, did not render him criminally liable under the provisions of section 11 of chapter 68 of the laws of the Fifteenth General Assembly, and the court further finds this conclusion on said finding of fact, that plaintiff by reason of facts so found is not estopped from recovering back all or any part of the over-charges claimed for herein." There is no ground for disturbing the finding of facts as above set out.

II. The question for our determination, which in our view is decisive of the case, is this: Does the doctrine of *par delictum* defeat recovery by plaintiff in this action?

1. CONTRACT:
illegal: ex-
ecuted: par-
ties equally
guilty.

Under this familiar doctrine, parties equally in fault, or equally violators of law, can have no remedy against each other based upon contracts or transactions which are esteemed unlawful. Thus, where one has paid money to the other, when such payment was unlawfully made or executed, the party making it cannot maintain an action to recover it back. The law provides no remedy for one who bases his claims to recover upon the violations of its provisions. Chapter 68, Acts of the Fifteenth General Assembly, provided for the maximum rates of charges for the transportation of persons and property by the railroads of the state. Section 11 declares that "any officer, agent or employe of any railroad company, person or corporation, operating a line of railroad within the state, who shall violate, or

be a party to the violation of, any of the provisions of this act, or be instrumental therein, shall be guilty of a misdemeanor," and shall be punished by fine and imprisonment, and that "any person, corporation or railroad company operating a railroad within the state, authorizing, directing, causing, permitting or allowing any violations of the act by any officer, agent or employe, shall forfeit and pay to the person injured five times the amount, compensation or charge illegally taken or demanded, or five times the amount of the damages caused."

Upon this act plaintiff seeks to recover in this action, which is founded on the payment by plaintiff, and the exaction and receipt by defendant, of illegal charges for the transportation of property. The plaintiff, as agent of defendant in receiving illegal charges, was guilty of a misdemeanor. The defendant as a corporation, in requesting and exacting the payment of the charges, was guilty of a violation of law, and subjected to a penalty therefor. The difference in the punishment to be inflicted upon the agent and the corporation is accounted for by the fact that offenses committed by corporations cannot be punished by imprisonment. The doctrine of *par delictum* is not modified by the degree of guilt of the violators of the law, or the turpitude of the offense. Nor does it have respect to the punishment inflicted. When, therefore, the expression is used that the parties shall be equally guilty in order to demand its application, the thought is conveyed that each party must be guilty of the violation of law. Of the guilt of the defendant there can be no question. Does plaintiff share in the guilt of violating the law? The facts are these. Plaintiff as agent of defendant received illegal charges from himself, and paid the same to defendant. He occupied a double position. He was agent of defendant and an individual shipper. It is insisted that he paid the money to defendant as a shipper. Let this be admitted. But to whom did he pay it? To himself as agent. The charges first went into his hands as agent, and as agent he paid them to defend-

ant. In receiving the illegal charges as agent he violated the law. He cannot shield himself from the consequence thereof by insisting that any of his acts in respect to the charges, were individual transactions. The law has no respect to the relations of one who violates its provisions, and it will not make curious distinctions in order to relieve a law breaker from the consequences of his act. It will not enquire whether the act was done as an agent or as an individual. Guilt follows the purpose to violate the law. The *animus* determines guilt, and it does not depend upon the relations of the individual.

III. It is insisted that defendant and plaintiff in the transaction were independent actors; that defendant was the oppressor, and plaintiff the subject of oppression, and that, in the language of Lord Ellenborough, (*Smith v. Cuff*, 6 M. & S., 160,) the defendant held the rod and plaintiff bowed to it. This would all be quite true were the fact of agency out of the way. But as agent plaintiff acted in receiving and remitting the illegal charges; he was himself the instrument of whatever oppression there is in the case; he held with his own hand the rod with which he chastised himself. His act was of the character of the act of the *felo de se*, who commits the crime of murder upon himself. The law will give him no remedy based upon his offense.

IV. It is argued that, as the statute was intended for the protection of shippers of goods by railways, and in the public interest, it ought to be enforced in this case. But the plaintiff, by his violation of the statute, as we have seen, cannot have its protection; and the public interest does not require that a law breaker shall receive benefits through his own offense.

V. Finally, the plaintiff cannot make out his case, except through the medium of the transaction wherein the illegal charges were paid and received, in which he was a party to the violation of the statute. Under these circumstances, the law will give him no remedy. Broom's Legal

Mitchell v. Donahey et al.

Maxims, *692. We reach the satisfactory conclusion that, upon the facts as found by the circuit court, plaintiff is not entitled to recover in this action. The judgment appealed from is therefore

REVERSED.

MITCHELL V. DONAHEY ET AL.

1. **Promissory Note: FRAUD AND CONSPIRACY IN OBTAINING SIGNATURE OF MAKER.** Where plaintiff was prosecuting a suit for damages against two defendants for fraud in imposing upon and selling to him a worthless patent right, and, pending the suit, plaintiff's attorneys entered into an agreement with one of the defendants, whereby he, while pretending to be a defendant, was to assist in the prosecution of the suit, and was to share the amount which should be recovered, and, under such arrangement, said defendant betrayed his co-defendant into executing with him a joint promissory note to plaintiff in settlement of the suit, *held* that plaintiff, if he knew at the time of the conspiracy by which the note was procured, or afterwards knowingly ratified it, could not profit by the transaction, and could not recover on the note as against the betrayed defendant.
2. ———: ———: **FRAUD OF ATTORNEY AS AFFECTING CLIENT.** In such case, if plaintiff was innocent of the fraud and conspiracy practiced by his attorneys, he would not be bound thereby, and he would be entitled to recover upon the note as against both defendants, unless it should be shown that the suit, in settlement of which the note was given, was founded upon no valid claim, and that the note was thus without consideration.

Appeal from Washington Circuit Court.

TUESDAY, DECEMBER 11.

THIS is an action upon a promissory note. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendants appeal. The facts of the case appear in the opinion.

H. & W. Schofield and *A. R. Dewey*, for appellants.

J. F. Brown, for appellee.

 Mitchell v. Donahey et al.

ROTHROCK, J.—I. The note in suit is negotiable in form, and was executed by the defendants to the plaintiff on the 29th day of November, 1880. It is in the sum of \$600, with interest at ten per cent., and payable in one year from its date. The defendants admitted the execution of the note. The defendant, Donahey, by his answer charged that as to him the note was without consideration, and was obtained by fraud and a conspiracy entered into and carried on by the plaintiff and his attorneys, and the defendant, Dean.

It appears from the answer of both defendants, and the reply of the plaintiff, that, prior to 1880, the defendant, Dean, claimed to be the proprietor of a patent "hog cholera" medicine, and that a partnership was formed to buy of Dean the right to make and sell the medicine in this state. The plaintiff and defendant, Donahey, were members of this partnership. In forming the partnership, plaintiff gave his negotiable promissory notes to Dean for \$750. Dean negotiated these notes, and plaintiff was compelled to pay them. He brought a suit against Dean and Donahey, in which he claimed that the patent right was a worthless fraud, and that, while Donahey pretended that he was entering the partnership, he did not really do so, but was in a partnership or conspiracy with Dean to cheat the plaintiff, and that he received part of the \$750 of which the plaintiff was defrauded. He commenced a suit against Dean and Donahey to recover for the alleged fraud. The note now in suit was given in a settlement and compromise of that action. It seems to be tacitly conceded that the patent right was a fraud. At least, it was not claimed to be otherwise by the parties in this action. Donahey claims that while that suit was pending a corrupt agreement was entered into between the plaintiff and his attorneys as one party, and Dean as the other party, by which Dean was released from all liability to the plaintiff, and was to receive a part of the amount which should be recovered of Donahey, in consideration that he

(Dean) would assist the plaintiff to recover of Donahey, and that this contract was carried out, and that Dean did aid and assist the plaintiff in obtaining evidence. Donahey further claims that this agreement was unknown to him, and that the suit was prosecuted by the aid of Dean until a jury was empaneled to try the same, when he was induced by Dean and plaintiff's attorneys to sign the note.

Dean admits that an agreement or contract was entered into between himself and plaintiff and his attorneys, in substance the same as that claimed by Donahey. The plaintiff denies that he entered into any such contract as that alleged by the defendants.

It will thus be seen that the parties complain of each other for fraud, from the commencement of the dealings between them up to the execution of the note in suit. In the first suit the plaintiff claimed that the defendants defrauded him of \$750, and in this suit the defendants claim that the plaintiff was a party to a corrupt and fraudulent agreement, by which Donahey was induced to execute the note, supposing that Dean was also liable thereon, when, instead of being liable, he was to receive part of the "plunder," as Dean in his testimony designated it.

The original suit was compromised in November, 1880. The defendants introduced in evidence on the trial in the circuit court the following written instrument:

"JAS. R. MITCHELL v. M. P. DONAHEY, CHAS. DEAN.	}	In District Court of Jefferson County, Iowa, on Change of Venue from Washington County.
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"It is hereby agreed that the defendant, Dean, is hereby released from any claim which the plaintiff may have against him in this cause, and for a valuable and good consideration he hereby transfers to Dean thirty per cent of whatever judgment is finally recovered. This July 1, 1880.

"JAS. R. MITCHELL,

"By McJUNKIN & HENDERSON, his Attorneys."

They also introduced in evidence the following written instrument:

"MITCHELL
v.
DONAHEY *et al.* }

"Whatever contract my attorneys, McJunkin & Henderson, have made with parties relative to an interest in this judgment, I hereby ratify and affirm.

"JAS. R. MITCHELL."

These instruments were placed in the hands of one Burris, to hold for the parties.

There was evidence to the effect that the signature to the last above instrument was the genuine signature of Mitchell. One witness testified in reference thereto as follows: "I judge it is Mitchell's signature. I am acquainted with his signature." There was other evidence to the effect that, when the compromise and settlement of the action was made by giving the note in suit, this original agreement, by which thirty per cent was to go to Dean, was modified so that Dean was to receive \$50 and be discharged, and that the reason of the change was that the original agreement would only be operative in case judgment was recovered. It also appears that Donahey had no knowledge of any of these agreements and negotiations until after the note in suit was given.

Now, while it is true that the plaintiff in his testimony denies that he had any knowledge of the contract with Dean for thirty per cent, and denies that he had any knowledge of the subsequent modification of that instrument, he does not deny that he executed the last above paper, being a ratification of the acts of his attorneys. That paper had reference to some persons who were to have an interest in the judgment, should a judgment be recovered. It does not appear that any contract had been made to which this ratifying instrument could have reference, except the thirty per cent contract with Dean.

The court instructed the jury that, under the pleadings

and evidence, the plaintiff was entitled to a verdict against both of the defendants for the full amount of the note.

The question to be determined is whether this instruction was correct. And the first inquiry is: Suppose the plaintiff knew of the use which it is claimed was made of Dean by plaintiff's attorneys, would that be any defense to the action? We are very clearly of the opinion that it would have been a complete defense. The original action was not a joint action. If the plaintiff had dismissed it as to Dean, he would have had the undoubted right to employ him in aiding in the prosecution of the suit by all honorable means. But Dean was retained as a party defendant to the end of the litigation, and he was required to sign the note which was the consummation of the compromise, and he was to receive a part of the proceeds when collected, and was not to pay any part of it. Such a transaction ought not to be sustained. The plaintiff cannot be allowed to use Dean as an instrument to compromise the suit with Donahey, and reward Dean for his services in that behalf, and at the same time pretend to be holding Dean as also liable to him. The relations between Dean and Donahey in that suit were entirely changed by Dean's employment by the plaintiff. But this change was made without Donahey's knowledge, and he made the settlement, being in part, at least, influenced thereby by Dean, and supposing their interests to be identical. It is scarcely necessary to say that a contract obtained by such means is against good morals, and void, and ought not to be enforced. It was Donahey's right to expect the utmost good faith and fairness from Dean, his co-defendant in that action; and, if the plaintiff used Dean to betray Donahey, he ought not to be allowed to profit by such a transaction.

We do not say that the plaintiff knew of the means which were used by his attorneys to effect the settlement, and he may have signed the ratifying instrument without a knowledge that anything unfair or fraudulent had taken place between his attorneys and Dean. But we think all these

questions should have been submitted to the jury. The jury should have been permitted to pass upon the question as to whether the plaintiff was a party to the betrayal of Donahey by Dean, or whether, with knowledge of the corrupt and immoral contract, he ratified it, by signing the ratifying instrument, if he did sign it.

II. But appellants' counsel claim that "the bringing of this action upon the note obtained by the fraudulent acts of his attorneys and his agent is itself a ratification of these fraudulent acts." It is without doubt a ratification of the compromise of the suit, because it is an attempt to enforce the payment of the note given in settlement of the suit. But, if the plaintiff did not know the means used to accomplish the settlement, and took the note, honestly supposing that it was a fair and just compromise of the claim he was pressing against the defendants, we do not think all of the consequences attendant upon an immoral and void contract should be visited upon him. He did not employ counsel for any such purposes.

In Parsons on Contracts, Vol. 1, 73, it is said: "A principal is liable for the fraud or misconduct of his agent, so far that, on the one hand, he can not take any benefit from any misrepresentation fraudulently made by his agent, although the principal was ignorant and innocent of the fraud, and, on the other hand, if the party dealing with the agent suffer from such fraud, the principal is bound to make him compensation for the injury so sustained; and this, although the principal be innocent, provided the agent acted in the matter as his agent and distinctly within the line of the business entrusted to him."

These rules are surely a correct statement of the law. Applying them to the point now under consideration, what are the rights of the parties? If the plaintiff was innocent, and if he had no agency in the immoral contract, can it be held that he should suffer the loss of any claim he had against the defendants in the original action? We know of

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no rule of law that imposes any such hardship. No turpitude attaches to him by seeking to enforce the payment of the note. All that can fairly be claimed is, that he shall not be permitted, by adopting the compromise and settlement, to defraud the defendants, by compelling them to pay a claim which in justice they ought not to pay. In the language above quoted, "if the party dealing with the agent suffer by such fraud, the principal is bound to make him compensation for the injury so sustained." It was, therefore, incumbent upon the defendants to show that they were injured by giving the note. To make this appear, they should have shown that the claim made by the plaintiff in the original action was without merit in law and fact, and that the note was, therefore, without consideration. They did not attempt to make such proof.

If this were the only question in the case, we would affirm it without hesitation. But as we think there was sufficient evidence to submit to the jury the question as to the actual participation of the plaintiff in a grossly immoral transaction, the judgment of the circuit court will be reversed, and the cause remanded for a new trial.

REVERSED.

62	328
80	749

BULLARD V. THE DES MOINES & FT. DODGE R'Y CO. ET AL.

1. **Des Moines River Grant: LANDS ABOVE THE RACCOON FORK: TITLE BY PRE-EMPTION.** Under the various resolutions and acts of congress, instructions of the commissioner of the general land office, and judicial decisions, referred to in the opinion, the lands in the odd numbered sections above the Raccoon Fork of the Des Moines river, at one time supposed to be included in the Des Moines river grant, *held* not to have been subject to pre-emption in May, 1862, and that the title of plaintiffs to the lands in controversy, being based upon such pre-emption, could not be sustained.

Appeal from Humbolt District Court.

TUESDAY, DECEMBER 11.

THE main object of this action is to determine the title and ownership of certain land described in the pleadings. There was a trial before the court, and judgment for the defendants. The plaintiff appeals.

Edward F. Bullard, pro se.

J. F. Duncomb, for appellee.

SEEVERS, J.—The plaintiff claims title to the land in controversy under certain pre-emptions made by Bicknell, Botsford and Rose in May, 1861, the payment of purchase money to the United States in July, 1867, and the issuance of patents therefor in 1869. The defendants claim that the lands were not subject to pre-emption, but had been withdrawn from market and pre-emption by the United States, and that they acquired title under the act of congress of July 12th, 1862.

As we understand, the right of this controversy depends largely or entirely on the question whether the lands were subject to pre-emption in May, 1862.

The lands in controversy are in odd numbered sections, above the Raccoon Fork of the Des Moines river, and within the grant made July 12, 1862.

Upon the supposition that the lands were included in the Des Moines river grant made by congress in 1846, they were reserved or withdrawn from sale in 1849.

In *Dubuque & Pacific R. R. Co. v. Litchfield*, 23 Howard, 66, it was held that the grant of 1846 did not extend above the Raccoon Fork, and, as the lands had been withdrawn or reserved upon the supposition above stated, and as they are situated above the Raccoon Fork, it is insisted that the effect of the decision in the above cited case was to

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restore the lands above the Raccoon Fork to sale, entry or pre-emption. Whether this is so or not, we have no occasion to determine, because in May, 1860, the commissioner of the general land office made and issued the following order:

"Notice is hereby given that the lands along the Des Moines river, in Iowa, within the claimed limits of the Des Moines grant in that state, above the mouth of the Raccoon Fork of said river, which have been reserved from sale heretofore on account of the claim of the state thereto, will continue reserved, for the time being, from sale or from location, by any species of scrip or warrants, notwithstanding the recent decision of the supreme court against the claim.

"This action is deemed necessary to afford time for congress to consider, upon memorial or otherwise, the case of actual *bona fide* settlers, holding under titles from the state, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper."

This order continued in force the reservation theretofore made, and the lands were not subject to pre-emption, because the act of congress, under which such right is claimed, provides, in substance, that if the land was reserved for any purpose it was not subject to pre-emption. U. S. Statute at Large, Vol. 5, 455, § 10.

But the appellant insists:

I. That the reservation made by the commissioner of the general land office in May, 1860, was superseded by the joint resolution passed by congress on March 2, 1861, and that it was so held by the supreme court of the United States in *Crilly v. Burrows*, 17 Wall., 167. The joint resolution of March the 2nd, 1861, is as follows: "That all the title which the United States still retains in the tracts of land along the Des Moines river, above the mouth of the Raccoon Fork thereof, which have been certified to said state improperly by the department of the interior as a part of the grant by act of congress approved August 8, 1846, and which is now held

by *bona fide* purchasers under the state of Iowa, be, and the same is hereby, relinquished to the state of Iowa." The only effect of this resolution was to confirm all titles which were derived from the state to lands which had been wrongly certified to it. There is nothing in the resolution which directly or by implication conveys the thought that the action of the land department, reserving the lands from sale or pre-emption, was superseded thereby, and we cannot think *Crilley v. Burrows* so holds, but that it has reference to lands the title to which was other and different from those in controversy.

II. It is insisted that the lands in controversy were subject to pre-emption in May, 1862, even if they had been reserved under the act of 1846. In support of this position *Dubuque & Pacific R. R. Co. v. Litchfield*, 23 Howard, 66, is cited. We deem it sufficient to say that, in our opinion, the case cited does not sustain the claim made by counsel.

It is further insisted that the right of pre-emption exists as to all lands belonging to the United States, to which the Indian title has been extinguished, and which has not been reserved by any treaty, law or proclamation of the President of the United States. U. S. Statutes, §§ 2257-2258. This question, we think, has been determined adversely to the plaintiff in *Wolcott v. Des Moines Co.*, 5 Wall., 681; *Williams v. Baker*, 17 Id., 144, and *Homestead Co. v. Valley R. R. Co.*, Id., 153, which cases hold, as we understand, that these said lands had been reserved by competent authority. This being so, they were not subject to pre-emption during the time of the reservation so made. *D. & S. C. R. Co. v. D. M. V. R. Co.*, 54 Iowa, 89. As the lands were not subject to pre-emption in May, 1862, and the title thereto was vested in the state of Iowa by the joint resolution of March 2, 1861, and the act of Congress of July 12, 1862, as was held in *Baker v. Williams*, above cited, it seems to us that the plaintiff does not have title to the lands in controversy.

Inasmuch as the question of title to lands included in these same grants, and the question whether they were reserved by competent authority at various periods of time, have been frequently before this court and the supreme court of the United States, and have been determined, we are not disposed to extend this opinion for the purpose of considering various points made by the appellant, which necessarily, it seems to us, were involved in the cases heretofore determined. This case must be determined in accordance with legal principles, as distinguished from those which prevail in courts of equity. It would be useless to discuss such equities.

III. It is claimed that the defendant is estopped by contract from disputing the title of the plaintiff. But, as we understand, the transaction relied on as a contract is not of that character. It never was executed by the defendants, and consists of a conditional proposition made to defendants by Bicknell, under whom plaintiff claims.

It is claimed that the plaintiff was induced by false representation to purchase and pay more for a tract of land conveyed to him by defendants, on the faith and belief induced by the latter that he, plaintiff, would obtain title to all or a portion of the lands in controversy. We find that the preponderance of the evidence in this respect is against the plaintiff.

IV. The plaintiff, in case it is held that the lands in controversy belong to the defendants, insists that we proceed to determine the value of the improvements on the land. The only question considered below, under the agreement of the parties, was as to the title, and no other question will be considered by us.

AFFIRMED.

MEADOWS V. THE HAWKEYE INSURANCE CO.

1. **Pleading:** REPLY TO ANSWER WHICH DOES NOT PRESENT A COUNTER-CLAIM. An answer which is not a counter-claim is considered denied, and a reply denying such answer is not allowed. Code, § 2665. And where a reply both denies the allegations of such an answer, and pleads matter in avoidance thereof, the denial must be disregarded, and the plea in avoidance must be regarded as implying a confession of the answer.
2. **Insurance:** CONDITION IN POLICY ENFORCED. Where a policy of insurance contained the following condition: "The commencement of foreclosure or other proceedings upon any mortgage * * * * shall immediately render this policy null and void," and, subsequently to the execution of the policy, foreclosure proceedings were commenced upon a mortgage covering the property insured, under which the property was sold prior to its destruction by fire, *held* that no recovery could be had upon the policy.

Appeal from Ringgold District Court.

TUESDAY, DECEMBER 11.

ACTION upon a policy of insurance. There was a judgment upon a verdict for plaintiff. Defendant appeals. The facts of the case are stated in the opinion.

R. W. Barger, for appellant.

Henry & Spence and *Laughlin & Campbell*, for appellee.

BECK, J.—I. The policy contains a condition in the following language: "The commencement of foreclosure or

1. **PLEADING:** reply to answer which does not present a counter-claim. other proceedings upon any mortgage, lien or incumbrance of any kind, or of any suit or action in any court concerning the title in any wise, shall immediately render this policy null and void."

The answer alleged that, subsequent to the execution of the policy, foreclosure proceedings were commenced upon a mortgage covering the property insured, which resulted in a de-

62	387
94	384
94	420
62	387
106	227
62	387
114	155

cree therein, upon which the property was sold prior to its destruction by fire. The defendant insists that the policy is void under the condition above quoted. The plaintiff filed a reply wherein he alleges, among other matters, that he has neither knowledge nor information sufficient to form a belief as to the truth of the allegations of the answer. In another count of the reply he avers "that it is true that, on or about the time stated in the answer, there was a certain mortgage foreclosed against said premises, as stated in the answer, but such mortgage was not made by plaintiff, nor was plaintiff liable therefor, or for the payment thereof; that there was a sale of said premises thereunder, as alleged by defendant, but that defendant had full knowledge of the commencement and prosecution of such foreclosure proceedings from their commencement to their close, and did not in any manner notify plaintiff that the policy sued upon was avoided, or that it would insist on a forfeiture thereof, and that, ever since plaintiff made his application for said policy, up to the present time, defendant has held the note of plaintiff given for the premises under said policy, and has permitted interest to accumulate thereon, and has never offered to return said note to plaintiff." The reply further alleges that defendant, with full knowledge of the facts, notified and requested plaintiff to furnish proofs of loss, which was done at loss of time, trouble and expense. A motion to strike, and a demurrer, were directed against the parts of the answer just set out and recited, but each was overruled. A like motion and a demurrer to another part of the reply, the second count, were sustained. These pleadings, and others filed in the case, need not be more particularly referred to in this opinion.

Upon the trial, the plaintiff introduced in evidence the policy, and proved the destruction of the property insured by fire, and thereon rested his case. The defendant thereupon asked the court to direct a verdict to be brought in for it, on the ground that plaintiff admitted in his reply the facts pleaded by defendant, which annulled and avoided the policy,

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and the evidence does not tend to show any waiver of the forfeiture, or any promise or agreement of defendant to pay the loss. The motion was overruled, and a verdict was had for plaintiff, upon which judgment was rendered.

II. We shall first inquire whether the reply of plaintiff admitted the allegations of the answer setting up a forfeiture of the policy. A reply is not permitted, except where a counter-claim is set up, or some matter is pleaded in the answer to which plaintiff claims a defense by reason of facts which avoid the matter alleged in the answer. Code, § 2665. The reply is not admissible, except to a counter-claim, or to plead matter in avoidance of the defense set up by the defendant. In order to avoid the defendant's defense, it must, of course, be admitted; for reason would not permit a party to allege an avoidance of a defense which is wholly denied. If the allegations sought to be avoided are not true, it is plain that matter pleaded in avoidance can have no existence. The very meaning of the words "avoid" and "avoidance," when used by pleaders, implies the admission of the defense sought to be avoided. Bouvier's Law Dictionary. Indeed, there cannot be an avoidance without a confession of the defense sought to be avoided. Gould's Pleadings, p. 34; 1 Chitty's Pleadings, 556.

III. Counsel for plaintiff insist that, as inconsistent defenses may be stated in the same answer or reply, (Code, § 2710,) we must regard plaintiff's reply as both denying the allegations pleaded as a defense, and as alleging facts avoiding it. But there is something more than an inconsistency in the pleading. The avoidance is based upon and cannot be made without an admission of the defense set up by defendant. If the reply be regarded as denying the allegations of the defense, then does it fail to present an avoidance?

Counsel cite, in support of their position, *Barr v. Hack*, 46 Iowa, 308, which holds that, in an action for slander, a general denial may be pleaded in the answer with a justification. It may be conceded that the rule of the case applies to

answers in all forms of actions setting up defenses to the plaintiff's claim. But it is made plain by the following considerations that the rule does not apply to a reply to an answer under our system of pleadings. The following provisions are found in the Code: "Section 2665. There shall be no reply except: 1. Where a counter-claim is alleged; or 2. Where some matter is alleged in the answer to which the plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the answer."

"Section 2666. When a reply must be filed, it shall consist of: 1. A general or specific denial of each allegation or counter-claim controverted, or any knowledge or information thereof sufficient to form a belief; or 2. Any new matter not inconsistent with the petition, constituting a defense to the matter alleged in the answer; or the matter in the answer may be confessed and any new matter alleged, not inconsistent with the petition, which avoids the same."

"Section 2667. Any number of defenses, negative or affirmative, are pleadable to a counter-claim, and each affirmative matter of defense in the reply shall be sufficient in itself, and must intelligibly refer to the part of the answer to which it is intended to apply. * * * * *"

It will be observed from these provisions that a reply is not permitted to deny the allegations of the answer, which is regarded as denied without further pleadings. See cases cited in Miller's Code and McClain's Statutes. A denial of the allegations of the answer is unknown and is forbidden. A counter-claim, introducing new matters not put in issue by the petition and answer, must be denied by a reply. "New matters, not inconsistent with the petition, constituting a defense to the matter alleged in the answer," and matters in confession and avoidance of the defense pleaded in the answer, must be set up in the reply.

In the case at bar, the part of the reply denying the allegations of the answer must be disregarded, for the reason that it is forbidden by the statute. The reply must be regarded as

presenting nothing more than matter in confession and avoidance. We must, therefore, regard it as containing no denial of the allegations of the answer, and as containing nothing further than an admission and avoidance of the allegations of the answer, setting up the particular defense pleaded therein.

III. The allegations of the answer, showing the foreclosure of a mortgage subsisting against the property, and the sale of the insured premises thereunder, are admitted by the reply. The plaintiff introduced no evidence to support his allegations of matters in avoidance.

We are to inquire whether the defense thus pleaded is sufficient to defeat the action. We need not inquire into the sufficiency of the matters in avoidance, pleaded by the reply, for no attempt was made to support them by proof.

The facts admitted by the reply are in direct violation of the condition of the policy above quoted. Under this condition, the policy becomes absolutely void upon the happening of the things contemplated therein, without any act on the part of the insurance company. The condition is a part of the contract entered into by the parties, and must be enforced. We cannot make a new contract for them, nor refuse to enforce the contract they made for themselves. *Supple v. The Iowa St. Ins. Co.*, 58 Iowa, 29; *Titus v. Glens Falls Ins. Co.*, 81 N. Y., 410; *McIntire v. Norwich Ins. Co.*, 102 Mass., 230; Wood on Insurance, p. 550.

We reach the conclusion that the court below erred in refusing to direct the verdict for defendant. As this point is decisive of the case, other questions discussed by counsel need not be considered.

REVERSED.

SHINER V. JACOBS ET AL., TOWNSHIP TRUSTEES.

62	392
114	198
114	201

1. **Exemption from Taxation:** CHANGE OF BY SUBSEQUENT LEGISLATURE: CONSTITUTIONAL LAW. Where an exemption from taxation is provided by the general laws of the state upon certain conditions, persons complying with the conditions do not thereby acquire such vested rights against the state as to deprive a subsequent legislature of the power to alter the law and modify or remove the exemption. So held in this case, involving the right of the legislature to modify § 798 of the Code, providing exemption to persons planting forest trees.

Appeal from Iowa Circuit Court.

TUESDAY, DECEMBER 11.

THE plaintiff is the owner of two quarter sections of land. He planted twenty-four acres of forest trees on one quarter section, and twenty-three acres on the other. The trees were planted and cultivated for timber, and were not more than twelve feet apart, and on January 1, 1881, they were in good condition, standing and growing on the land. Part of the trees were planted in 1879, and all of them were planted within nine years previous to January, 1881. In the assessment for taxation in the year 1881, one quarter section was valued at \$1,404, and the other at \$1,440. The assessor deducted from these amounts the sums of \$702 and \$720, respectively, being one-half of the valuation. The deductions were made on account of said growing trees. The plaintiff claimed that there should have been deducted the sum of \$100 for each acre of forest trees so growing on each quarter section. He made this claim to the board of equalization, and it was disallowed. He appealed to the circuit court, and set forth the foregoing facts in a petition therein filed. There was a demurrer to the petition, which was sustained, and plaintiff appeals.

Rumple & Lake, for appellant.

Feenan, Hughes & Kirk, for appellees.

ROTHROCK, J.—Section 798 of the Code provides that “for every acre of forest trees planted and cultivated for timber within the state, the trees thereon not being more than twelve feet apart, and kept in a healthy condition, the sum of \$100 shall be exempted from taxation upon the owner’s assessment, for ten years after each acre is so planted, *provided* that such exemption be applied to the realty owned by the party claiming the exemption, not to exceed one hundred and sixty acres of land upon which the trees are grown and in a growing condition.”

By chapter 190 of the Acts of the General Assembly for the year 1880, this section was amended as follows: “Provided that the amount so deducted shall not exceed one-half of the valuation of the realty upon which such exemption is claimed.”

There is no saving clause in this amendatory proviso. By its terms it applies to all lands which before that had been planted in forest trees, as well as to such as might thereafter be devoted to timber culture. But the plaintiff contends that the amendment can have no application to his lands, because, when he accepted the terms of the original statute and complied with its requirements, his right to exemption from taxation to the extent of \$100 per acre for ten years became complete, and that it was in the nature of a contract entered into between him and the state, and that the legislature had no power to impair the obligation of the contract, and that the removal of the exemption was in violation of section 10, article 1, of the Constitution of the United States.

The exemption provided for was an act of general legislation. It was applicable to all the prairie lands in the state. Every owner of lands was thereby invited to devote a part of his land to the culture of forest trees. The law was not in the nature of a contract between the state and such land owners as availed themselves of its provisions. It appears to be well settled that, where an exemption from taxation is

Shiner v. Jacobs et al., Township Trustees.

provided for by the general laws of the state, any subsequent legislature is not thereby deprived of the power to alter the law and remove the exemption. *People v. Roper*, 35 N. Y., 629; *East Saginaw Manf. Co. v. The City of East Saginaw*, 19 Mich., 259; Same case, 13 Wallace, 373; *Rector, etc., of Christ's Church v. The County of Phila.*, 24 Howard, 300; *Hagar v. The Supervisors of Yolo Co.*, 47 Cal., 222.

The most of the authorities cited by counsel for appellant are cases arising upon charters granted by the state, and upon treaties, and the like, made with individuals, and it is held that these obligations cannot be impaired by subsequent legislation. The supreme court of the United States is the final arbiter upon all questions where any provisions of the federal constitution are involved, and in *Salt Co. v. East Saginaw*, 13 Wal., 373, the principle involved in this case appears to us to be definitely settled. We quote from the head note, which is a fair epitome of the opinion in that case: "A law offering to all persons, and to corporations to be formed for the purpose, a bounty of ten cents for every bushel of salt manufactured in the state from water obtained by boring in the state, and exemption from taxation of the property used for the purpose, is not a contract in such a sense that it cannot be repealed. Such a law is nothing but a bounty law, and in its nature a general law, regulative of the internal economy of the state, dependent for its continuance upon the dictates of public policy and the voluntary good faith of the legislature.

"General encouragement held out to all persons indiscriminately to engage in a particular trade or manufacture, whether in the shape of bounties, drawbacks, or other advantage, are always under the legislative control, and may at any time be discontinued."

We think the demurrer was properly sustained.

AFFIRMED.

Furman v. The Chicago, Rock Island & Pacific Railway Company.

FURMAN V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

68	396
81	541

1. **Husband and Wife: AGENCY BETWEEN: DEGREE OF EVIDENCE TO ESTABLISH.** The marital relation alone raises no presumption of agency between husband and wife, but the existence of this relation may aid or impair the significance of other evidence tending to show agency. It is accordingly *held*, in this case, where it was sought to establish the agency of the husband as against the wife in the matter of shipping household goods used and enjoyed by them jointly, that slight evidence of the wife's authority was sufficient.
2. ———: ———: **FACTS TENDING TO ESTABLISH.** Where a husband had in his possession the defendant's receipt or bill of lading for certain household goods used and enjoyed by himself and wife jointly, and exhibited it to defendant's agents, and on the strength thereof gave directions for the reshipment of the goods, *held* that these facts, unless otherwise explained or accounted for by the husband, were entitled to consideration as tending to prove the husband's authority to act for his wife in the premises.
3. ———: ———: **NOTICE TO AGENT BINDS PRINCIPAL.** Where the husband, as agent for the wife, attended alone to the shipment of certain household goods owned by the wife, and the goods, after delivery to the defendant for shipment, were seized upon a writ of attachment against the goods of the husband, *held* that notice of the seizure, given by the defendant to the husband, was notice to the wife.
4. ———: ———: **PRESUMPTION FROM CONDUCT.** Where the husband alone attended to the shipment of household goods belonging to the wife, and the wife was not present, and took no part in the transaction, the defendant, to whom the goods were delivered for shipment, was warranted in considering the husband as the wife's duly authorized agent, unless notified to the contrary.

Appeal from Muscatine District Court.

TUESDAY, DECEMBER 11.

THE plaintiff claims of the defendant \$2,363.90, the alleged value of certain household goods delivered to the defendant in Chicago for transportation to Atchison, Kansas, which defendant has failed to deliver to plaintiff, the consignee. There was a verdict and judgment for the plaintiff. The defendant appeals. The material facts are stated

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in the opinion. The case was before us upon a former appeal. See 57 Iowa, page 42.

J. Carskaddan, for appellant.

Brannan, Jayne & Hoffman, for appellee.

DAY, CH. J.—I. The material facts of this case are briefly as follows: About May 1, 1878, the plaintiff and Geo. M.

1. HUSBAND
and wife:
agency be-
tween: de-
gree of evi-
dence to es-
tablish.

Furman, her husband, who then resided in Chicago, broke up housekeeping, packed and boxed their furniture and household goods, and stored them in a warehouse. Evidence was introduced tending to show that the goods were purchased with the separate means of the plaintiff, and that they belonged to her. Intending to remove to Atchison, Kansas, on the eighth day of May, 1878, they had the goods taken from the warehouse to the defendant's depot in Chicago, marked them "Mrs. E. Furman, Atchison, Kansas," and the defendant gave a bill of lading or shipping receipt therefor, stating that the goods were received from Mrs. E. Furman. The evidence tends to show that the plaintiff's husband attended to the delivery of the goods to the defendant for shipment to Atchison, and that he received the shipping receipt therefor. After the goods were delivered at the depot, and on the same day, they were seized and taken from defendant's custody by a constable, on a writ of attachment issued by a justice of the peace of Chicago, in an attachment suit for \$52 rent, in favor of Jacob Stephani and against the plaintiff's husband, and were afterwards, on the eighteenth of June, sold by the constable for \$70, under an order of sale issued upon judgment rendered in the attachment proceeding. Neither the plaintiff nor her husband went to Atchison. About the fourteenth of May, 1878, the plaintiff left Chicago and went visiting in Missouri. Plaintiff's husband came from Chicago to Muscatine about May 20, 1878, and engaged in the sewing machine and stationery business. The plaintiff's

husband wrote to her frequently from Muscatine, and informed her that he had decided to make that his place of business, and, about August 1, 1878, she joined him there. The parties having decided to settle in Muscatine, on the fourth day of June, 1878, the plaintiff's husband called on A. O. Warfield, the station agent of defendant at Muscatine, and presented the shipping receipt given at defendant's Chicago office, and ordered the goods reshipped from Atchison to Muscatine. Warfield telegraphed to Atchison, and was informed by the Atchison agent that the goods had never been received there. Warfield then telegraphed to Chicago, describing plaintiff's shipping receipt, and asking what had become of the goods. He was informed of the attachment seizure, with name of the Chicago justice who issued it, and the location of his office. This intelligence was received June 5, and was communicated to the plaintiff's husband, who thereupon undertook to get the goods released. To this end he sent money to his attorney at Chicago, W. C. Minard, to pay the Stephani claim. Minard received the money from Furman with which to pay off the attachment and release the goods, about June 14, but, learning that Stephani had died on the ninth of June, and that no executor had been appointed, he declined paying the judgment. On the seventeenth of June he took an appeal from the justice to the Cook county circuit court. He failed to serve his supersedeas on the constable, who, in ignorance of the appeal, on the eighteenth of June, sold the goods at public auction under his order of sale. Upon the trial it became a very important question whether the plaintiff, either personally or through her agent, had notice of the seizure of the goods in Chicago in time to prevent their sale under the attachment proceedings. It appears that the plaintiff's husband had notice of the seizure of the goods on the fifth day of June, and that he forwarded money to pay off the claim, which was received by his attorney in Chicago on the fourteenth day of June, four days before the sale of goods. Hence, it became a most

Furman v. The Chicago, Rock Island & Pacific Railway Company.

material question whether the plaintiff's husband, as to matters pertaining to the shipping and caring for the goods, was her agent, so that notice to her husband was notice to her. Upon this branch of the case the court, upon request of the plaintiff, instructed the jury as follows: "The husband is not by virtue of the marital relation the agent of the wife in respect of property which belonged to the wife, although such property may consist of household goods, the use of which was enjoyed by both. * * * The facts necessary to show that the husband was authorized to act as agent of the wife must be of the same character and of the same weight as are required to show agency in any other person." It may be conceded that, ordinarily, the rule is as stated by the court. See *McLuran v. Hall*, 26 Iowa, 297; *Miller v. Hollingsworth*, 33 Id., 224. But as to the mere shipment and preservation of household goods, jointly used by the husband and wife, we think something may be implied from the marital relation, and that, in such case, the agency of the husband may be inferred from slighter circumstances than would be necessary to establish an agency upon the part of a stranger. In Abbott upon Trial Evidence, page 167, it is said: "The marital relation alone raises no presumption of agency between them; but its existence may aid or impair the significance of other evidence tending to show agency. Thus, when the agency of the wife is alleged against the husband in matters of a domestic nature, slight evidence of actual authority is enough; while, if his agency is alleged against her to divest her of her estate without consideration, the existence of the relation is a reason for requiring unusually strict proof of authority." In this case the agency of the husband is invoked, not in a transaction divesting the wife of her estate without consideration, but in a transaction allied in principle to the agency of the wife in matters of a domestic nature. We think the same rule applies to the agency of the husband, in the case at bar, as to the agency of the wife in matters of a domestic nature, that

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slight evidence of actual authority is sufficient, and that the court erred in instructing the jury that the proof of agency must be of the same character and the same weight as are required to show agency in any other person.

II. The defendant assigns as error the refusal of the court to give the jury the following instruction: "If it appears from the evidence that plaintiff's husband
2. —: —: facts tending to establish. had the defendant's receipt or bill of lading for the goods in controversy, on which plaintiff brings this suit, in his possession at Muscatine, Iowa, on or about June 5, 1878, and exhibited the same to the agent or agents of the defendant at Muscatine, and if such possession of said receipt or bill of lading by plaintiff's husband is not denied, explained or accounted for by plaintiff, and it further appears that plaintiff's husband exhibited said receipt to defendant's agent or agents at Muscatine, and, on the strength thereof, gave directions as to enquiry for and reshipment of said goods, then you are authorized to consider such facts as tending to prove that plaintiff's husband held such receipt or bill of lading with plaintiff's consent, and that he was authorized to receive and receipt for said goods for her." This instruction should have been given. At the very least, the facts enumerated are entitled to consideration, as tending to prove the authority of plaintiff's husband to act for her in the premises.

III. The defendant also assigns error upon the refusal of the court to give the following instruction: "If it appears that the goods in controversy were marked and
SAME AS NO. 1. designated as household goods, and had been used by plaintiff and her husband in their housekeeping, and were intended to be so used, then you will be authorized to find that plaintiff's husband was her agent in the shipment and control of said goods, from slighter evidence than would be required to establish such agency between strangers, or parties not standing in the relation of husband and wife. And

if you find that plaintiff's husband was her agent in respect to
 3. —: —: the shipment and control of said goods, then
 notice to agent binds principal. notice to him of the attachment of the goods
 would be notice to her." This instruction is in
 harmony with the views already expressed, and should have
 been given.

IV. The defendant complains of the refusal of the court
 to instruct the jury as follows: "If it appears that plaintiff's
 husband was present at and superintended or
 4. —: —: presumption from conduct. looked after the shipment of the goods in con-
 troversy at Chicago, and that plaintiff herself was
 not present at such shipment, and saw none of the agents or
 employes of the defendant in relation thereto, then the de-
 fendant had the right to consider him (the husband) as
 plaintiff's duly authorized agent in regard to the shipment
 and control of said goods, unless notified to the contrary."
 In our opinion this instruction contains a correct presenta-
 tion of the law, and it should have been given.

REVERSED.

68	400
190	150

62	400
137	552

62	400
144	187

STATE V. PROBASCO.

- 1. Criminal Law: MINORS IN SALOONS: KNOWLEDGE NOT NECESSARY TO CONVICTION.** Under chapter 59, Acts of the Fifteenth General Assembly, (McClain's Statutes, 1019; Miller's Code, 968,) making it unlawful for the keeper of a billiard saloon, or his employes, to permit minors to remain in the saloon, a conviction may be had without proving that the defendant knew of the presence of the minor, or of the fact of his minority. See cases followed and distinguished cited in opinion.
- 2. —: —: LIABILITY FOR OFFENSE OF SERVANT.** Under the statute aforesaid, if the saloon-keeper fails to enforce watchfulness on the part of his employes, and a minor is thus allowed to remain in his saloon, he and the employe are both guilty, and he cannot avoid punishment on the ground that the offense was the offense only of his servant.

Appeal from Union District Court.

TUESDAY, DECEMBER 11.

AN information was filed before a justice of the peace, charging defendant with permitting a minor to remain in a billiard saloon kept by defendant, in violation of the statute. Upon an appeal to the district court, defendant was convicted. He now appeals to this court.

J. H. Copenheifer and Stafford & Denning, for appellant.

Smith McPherson, Attorney-general, for the State.

BECK, J.—I. There was evidence, which was not contradicted, that one Clark, a minor, was frequently in a billiard saloon kept by defendant, and spent nearly all of one day (June 20th, 1882,) therein, and on that occasion played pool there. The defendant employed two or three bar-tenders, and a man to look after the billiard tables and the playing upon them. These men were present attending to their duties while the minor was in the saloon. There was no evidence that the employes of defendant knew that Clark was a minor. The defendant testified that he did not know Clark, and saw him in the saloon but once, and then, on account of his attire and appearance, defendant declares that he appeared to be thirty or forty years old. *Shooking*

II. The district court gave to the jury the following instructions, of which defendant complains: "3. Before you

1. CRIMINAL
law: minors
in saloons:
knowledge
not necessary
to conviction.

can find the defendant guilty, you must find from the evidence and beyond a reasonable doubt:—
1st. That on or before the 20th of June, 1882, the defendant was the keeper of a billiard hall or saloon in Creston, Union county, Iowa.

"2d. That on or about the 20th day of June, 1882, the defendant, either by himself, agent, clerk or servant, permitted one George Clark to remain in said billiard hall or saloon.

"3d. That at that time said George Clark was a minor.

"4th. If you find from the evidence that the defendant was the keeper of a billiard hall or saloon in Creston, Union county, Iowa, and that on or about the 20th day of June, 1882, he by himself, agent, clerk or servant permitted one George Clark, who was at the time a minor, to remain in his said billiard hall or saloon, then it would be your duty to find the defendant guilty, whether the said defendant knew said Clark was a minor or not."

The defendant asked the court to direct the jury, in substance, that, to authorize conviction, they must find from the evidence that the minor was "a frequenter of the saloon by the permission of defendant," and that defendant or his employes had knowledge that Clark was in the saloon. The request was refused.

Chapter 59, Acts of Fifteenth General Assembly, § 1, provides that "it shall be unlawful for any person who keeps a billiard hall, beer-saloon or nine or ten-pin alley, or the agent, clerk or servant of any such person, or any person having charge or control of any such hall, saloon, or alley, to permit any minor or minors to remain in such hall, saloon, or alley, or to take part in any of the games known as billiards, nine or ten-pins." Section two provides punishment for the violation of the act. See McClain's Statutes, p. 1019; Miller's Code, p. 968. Under this statute, it is unlawful for the keeper of a billiard saloon or his employes "to permit" a minor to remain in the saloon. We must enquire into the meaning and force of the words "to permit." It implies express assent or license to do an act, or a failure to prohibit or prevent it. If it is the duty of one to prevent or prohibit an act, and he fails to do so, or to use efforts to do so, he permits it. He permits the act which he could have prevented. This is the common meaning of the word, and it is used in that sense in the statute before us.

It is the duty of saloon-keepers not to permit but to prevent minors remaining in their saloons. The same duty is

imposed upon their employes. If the keeper or his employe fails to take proper means to prevent minors remaining in their saloons, they permit it. Hence, if proper watchfulness is not exercised by either; if the keeper fails to enforce watchfulness on the part of his employes, and thereby a minor is permitted to remain in the saloon, both violate the statute.

It is obvious that, in the absence of watchfulness and proper effort to discharge the duty imposed by the statute, if a minor remain in the saloon without the knowledge of the keeper or employe, each is liable for the penalty provided by the statute. Neither can plead ignorance of the presence of the minor. It was their duty to know of his presence. Ignorance, especially when there has been no effort to gain knowledge, will excuse no one for the omission of duty, either in morals or law.

In the case of the defendant, it was his duty to be vigilant to prevent the presence of minors. When he has failed to do his duty in this regard, he cannot escape on the mere ground that he did not know he was violating his duty as prescribed by the statute. If he failed to require vigilance from his employes, or so conducted his business as to permit his employes to disobey the law, neither his ignorance nor theirs of the presence of Clark will excuse the defendant. The ruling of the district court in refusing the instruction asked by defendant, and in giving the third instruction above set out, is in accord with these views.

III. Defendant's counsel insist that it is necessary to show that defendant had knowledge of the presence of Clark in the saloon, before it can be found that he permitted it, and, in support of this position, cites *Abrahams v. The State*, 4 Iowa, 541; *State v. Ballingall*, 42 Id., 87; *Cobleigh v. McBride*, 45 Id., 116. The statutes construed in these cases either expressly applied, or were construed to apply, to permission with knowledge of the party accused. See Code 1851, § 2712; Code § § 1558, 1543.

THE SAME.

IV. Counsel insist that the rulings of the court below hold defendant guilty for the offense of his servant. This position is not correct. Both defendant and his servant may be guilty, and, as we have pointed out, knowledge of the presence of the minor need not be shown in order to establish the guilt of either.

V. The fourth instruction holds that defendant's guilt does not depend upon his knowledge of the minority of Clark.

It is complained of by defendant. This court has held that the guilt of one charged with a crime does not depend upon his knowledge of facts constituting the offense. And a like rule is applied in civil cases to recover for damages resulting from illegal acts. *State v. Newton*, 44 Iowa, 45; *State v. Whitcomb*, 52 Id., 85; *Jamison v. Burton*, 43 Id., 282. These cases cannot be distinguished in principle from the case before us. To hold differently would practically defeat the enforcement of the statute. Persons engaged in a business that becomes unlawful or criminal under certain conditions must exercise it at their peril, taking care that their acts are not unlawful. They must be vigilant to discover the existence of conditions which determine the unlawfulness of their acts. We have considered all questions arising in the case, and reach the conclusion that the judgment of the district court ought to be

AFFIRMED.

STATE V. CASTELLO.

1. **Evidence: CREDIBILITY OF WITNESS AS AFFECTED BY INTOXICATION.** While the intoxication of a witness at the time of the transactions of which he testifies does not destroy his credibility, it undoubtedly impairs it; but if his testimony is corroborated, or his recollection of the transaction appears to be distinct and clear, he is entitled to belief.
2. **Instructions: REFUSAL TO GRANT: NO PREJUDICE.** There is no error in refusing instructions asked, when, in view of the instructions given, they are not necessary to guide the jury in the proper determination of the case.

3. **Manslaughter: INTENTION OF DEFENDANT: INSTRUCTION.** Upon an indictment for murder, the defendant asked the court to instruct the jury that his intentions in approaching the deceased must be presumed to be lawful, unless shown to be unlawful, and the court refused to give the instruction. *Held* that, if there was error in the ruling, it was cured by a verdict for manslaughter only, which did not imply any unlawful intention in approaching the deceased.
4. **Homicide: NOT PALLIATED BY FEEBLENESS OF DECEASED.** A homicide cannot be excused or palliated on the ground that the manslayer was ignorant of the fact that his victim's feeble condition was such as to render him unable to resist or survive the violence inflicted.
5. —: **SELF-DEFENSE: INSTRUCTION.** There is no error in an instruction which, in effect, directs the jury that a homicide will be excused, where it appeared necessary to the accused, as an ordinarily prudent man, to take the life of the deceased in his own self-defense.
6. **Manslaughter: DEFINITION OF: SELF-DEFENSE.** Self-defense excuses homicide; it has nothing to do in determining its degree. Hence it has no place in the definition of manslaughter, or of any other degree of homicide.

Appeal from Henry District Court.

TUESDAY, DECEMBER 11.

THE defendant was convicted of manslaughter, and sentenced to imprisonment in the penitentiary for three years. He now appeals to this court. The facts of the case are stated in the opinion.

Woolson & Babb, for appellant.

Smith McPherson, Attorney-general, for the State.

BECK, J.—I. The deceased, one Salberg, and a comrade, having been drinking together, were, at the time of the occurrences resulting in the homicide, in an intoxicated condition. The maudlin actions of the deceased provoked taunts of derision from three young men, or boys, as they are called in the testimony, who were near by, which excited his anger and resentment. He ran towards them, climbing over an intervening fence, threatening them or inviting them to

fight. One of the young men, defendant, approached the deceased, and a conflict ensued. The preponderance of the evidence is to the effect that defendant struck the first blow. No weapons were used by defendant. He struck the deceased two or three times, who, before the last blow, turned away and fled to the fence. The last blow was given him when he was at the fence. These blows were with the fist, and were all received by deceased about the temple and side of the head. The defendant's evidence is to the effect that the deceased, before the blows, had taken from the ground a stone. But we are satisfied that the preponderance of the evidence fails to show that he used it or attempted to use it. Immediately after the last blow the deceased fell, and was soon dead. He is shown by the evidence to have been a man of feeble, though of rather large, frame. A *post mortem* examination revealed the facts that he was far gone with consumption, and that there were extravasations of blood in the brain. There were two or three contusions discovered upon the side of the head. The testimony authorized the conclusion that death resulted from the rupturing of a blood vessel of the brain.

II. This statement of facts is sufficient to introduce the consideration of the alleged errors complained of by defendant, which all relate to the instructions given to the jury.

1. EVIDENCE:
credibility of
witness as af-
fected by in-
toxication.

The comrade of the deceased, named Clowson, who was a witness for the state, was shown to be in an intoxicated condition at the time of the fight, and admitted it in his own testimony, which was reasonably clear and direct. He testified in effect that he had a distinct recollection of the affair. In directing the jury as to the effect of the witness' condition upon his credibility, the court used the following language:

"The fact that a witness present at the death of Salberg, and testifying as to facts, was under the influence of liquor to any extent, does not affect his credibility, if you find that, at

the time he was testifying, he distinctly remembered the facts as they occurred. It is the truth that the law seeks, and the condition of the witness is immaterial, except as a means of determining his ability and desire to know and tell the truth. And, if the witness now remembers the facts, and you believe he tells them truthfully, it does not matter what was his condition then."

We think the instruction is correct. It does not follow that the capacity of observation and the powers of memory are destroyed by intoxication, which is not to the degree producing stupor. While it must be admitted that intoxication does not destroy credibility, it undoubtedly impairs it. But, if the evidence of one who was intoxicated at the time of the occurrences of which he testifies is corroborated, or his recollection of the transactions appears to be distinct and clear, he is entitled to belief. This is the purport of the instruction just quoted. The district court gave to the jury other proper directions applicable to the case, which enabled the jury to determine the weight to be given to Clowson's evidence.

III. The defendant asked an instruction, the refusal of which is now made the ground of complaint, which does not present a rule materially different from the instruction above quoted. Another instruction refused contains directions as to the effect of the contradictions to Clowson's evidence by other witnesses in discrediting it. The instructions given in effect directed the jury to extract the truth from all the testimony, and to reject such part of it as appeared to be erroneous. The jury would certainly understand that they should find the facts to accord with the preponderance of the proof. The instruction in question was not demanded to guide them to this result.

IV. The defendant requested the court to instruct the jury that defendant's intentions in approaching the deceased must be presumed to have been lawful, unless shown to have been unlawful. The instruction is immaterial in view of the verdict for man-

2. INSTRUCTIONS: refusal to grant: no prejudice.

3. MAN-SLAUGHTER: intentions of defendant: instruction.

slaughter. Whatever may have been the intention of defendant in approaching deceased at the time of the conflict, if they were in fact lawful and peaceable, they would not excuse the unlawful homicide resulting from violence occurring after they came together. It may be that, had the verdict been for a homicide of a higher degree, prejudice from the refusal to give the instruction might have resulted.

V. The defendant requested the court to instruct the jury that they must be satisfied beyond a reasonable doubt that death resulted from the blows inflicted by defendant, to authorize them to convict. And another instruction asked was to the effect that, if there were two theories in relation to the cause of death, one consistent with innocence and the other with guilt, and each equally in harmony with the evidence, the jury should adopt the theory of defendant's innocence. The thoughts of these instructions, so far as they should have been presented to the jury, are expressed in an instruction given, announcing the rule of reasonable doubt. The jury would not have failed to entertain such a doubt, had the evidence, upon the points contemplated by these instructions, been of the character stated therein.

VI. An instruction asked by defendant was to the effect that, if, on account of the diseased condition of Salberg, a blow of less force caused his death than would have been required to take the life of a healthy man, the defendant cannot be held guilty, unless he knew of the true condition of the health of deceased. The instruction was properly refused, and the jury were informed, in substance, that the condition of Salberg's health would not excuse defendant. Surely, it cannot be claimed that a homicide may be excused on the ground that the man-slayer was ignorant of the fact that his victim's feeble condition was not such as to enable him to resist the violence.

VII. An instruction upon the doctrine of self-defense is

4. HOMICIDE
not palliated
by feebleness
of deceased.

Dimmick v. The Council Bluffs & St. Louis R'y Co.

understood by counsel to mean that homicide can only be
 5. ———; self- excused when it is reasonably necessary to take
 defense: in- life for the defense of the accused. But the
 struction. whole instruction unmistakably conveys the thought that, if
 such necessity appear to the accused, or would appear to an
 ordinarily prudent man, it is sufficient.

VIII. Counsel for the defendant insist that an instruction
 defining the crime of manslaughter leaves out of view the
 6. MAN- question of self-defense as an excuse for the hom-
 SLAUGHTER: definition of: icide. Self-defense excuses a homicide; it does
 self-defense. not indicate its degree. If it is established, there can be no
 conviction for the offense in any degree. Hence it has no
 place in the definition of manslaughter, or any other degree
 of homicide. The nature of the defense, and the evidence
 necessary to support it, were stated in other instructions.
 The court was not required to repeat them in connection with
 the definitions of the different degrees of crime arising from
 the killing of a human being.

IX. While the evidence in some degree is conflicting, it
 sufficiently supports the verdict.

We have considered all the points discussed by counsel,
 and reach the conclusion that the judgment of the district
 court ought to be

AFFIRMED.

DIMMICK V. THE COUNCIL BLUFFS & ST. LOUIS R'Y CO.

1. **Instructions: MUST REGARD THE EVIDENCE.** An instruction which
 takes for granted a state of facts not supported by the evidence is erro-
 neous.

Appeal from Pottawattamie Circuit Court.

TUESDAY, DECEMBER 11.

ACTION upon a commissioners' award of right of way
 damages.

There was a verdict for the plaintiff, and judgment was rendered thereon. The defendant appeals.

D. H. Solomon, for appellant.

M. P. Brewer, for appellee.

ADAMS, J.—This case is before us upon a second appeal. See 58 Iowa, 637. The evidence shows that a small triangular piece of land, amounting to about thirty-five square feet, belonging to the plaintiff, was embraced in the defendant's right of way proceedings for condemnation. The commissioners awarded the plaintiff \$600. The defendant, regarding the award as excessive, and, concluding that it did not need the land, decided not to take it, and it has never in any way interfered with the plaintiff's enjoyment of it.

But the plaintiff claims that a telegraph wire has been stretched across the land by the defendant, and that, such being the fact, the commissioners' award of right of way damages has become payable.

The court below gave an instruction upon the theory that there was evidence tending to show that a telegraph wire had been stretched across the land by the defendant. The court said: "If the defendant has constructed a telegraph line upon the right of way in question for the purpose of use in the operation of its railway, and said telegraph line passes over or upon the part of the plaintiff's lot in question, this will constitute such an appropriation of the said ground to use in the operation of its railway as will make the defendant liable to pay the award in question."

The defendant contends that there was no evidence upon which this instruction could be based.

The evidence which the plaintiff relies upon is the testimony of her husband. He was examined as a witness in her behalf, and testified that the wire was stretched across lot 13, of which lot the land in question is a part, but he did not say that it was stretched across the land in question. It is true,

Harris v. Heackman.

if it was stretched across lot 13, and was kept at all points within the land embraced within the original belt sought to be condemned, it would follow by necessity that it was stretched across the land in question. But it is not shown that the line was kept within that belt. It would not follow that it was, even if the poles were, for, if there was a curvature at that point,—and it is not shown that there was not—the line might be stretched over the part of the lot not within the belt. No other evidence is relied upon by the plaintiff, and we have to say that we see none upon which the instruction can be sustained.

REVERSED.

62 411
131 30

HARRIS V. HEACKMAN.

1. **Practice in Supreme Court:** FINDING OF TRIAL COURT CONSIDERED AS VERDICT OF JURY. The finding of facts by the trial court in a law action is regarded by this court as the verdict of a jury, and will not be set aside where the evidence is conflicting.
2. **Lease:** ACCEPTANCE OF RENT FROM ASSIGNEE OF: LESSEE NOT DISCHARGED. Where there is an express covenant to pay rent for a term of years, the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee.
3. —: DESTRUCTION BY FIRE: LESSEE NOT DISCHARGED. Where the lessee of ground owned a wooden building thereon, which was destroyed by fire during the term, and at the date of the lease the city had passed a fire limit ordinance, by which the lessee was prohibited from erecting another wooden building on the ground, *held* that he was not thereby discharged from his liability to pay rent to the end of the term.

Appeal from the Superior Court of Council Bluffs.

TUESDAY, DECEMBER 11.

THE plaintiff claims that in May, 1877, he entered into a written contract with defendant, by which he leased to defendant part of a lot in Council Bluffs, for the period of five years, and that defendant by said contract agreed to pay as

rent twelve dollars per month, monthly in advance, and that there is due to plaintiff the sum of two hundred and forty dollars on said lease.

The defendant admitted that he did "enter upon the said ground under a contract with plaintiff for the monthly ground rent of twelve dollars per month in advance, and that he was to occupy the same for five years," and averred that at that time defendant owned a wooden building situated on said lot; that he afterward sold said building, and assigned the lease to other parties, who took possession of the lot, and that, after that, the said other persons paid the ground rent to the plaintiff; that plaintiff had full knowledge of the sale of the building and transfer of the lease to the other parties, and accepted the rent from them, and that he thereby released and discharged the defendant from the payment of the rent. He denied that said lease was in writing. He further alleged that said lot was within the fire limits of the city, and said building was of wood, prohibited by ordinance, and was destroyed by fire, and that no new wooden structure could lawfully be erected upon said lot.

There was a trial by the court, and a judgment for the plaintiff. Defendant appeals.

G. A. Holmes, for appellant.

Flickinger Bros., for appellee

ROTHROCK, J.—I. The plaintiff claimed that the original written lease was lost, and he introduced secondary evidence of its contents. It is claimed by appellant that the evidence thus introduced was insufficient to show that there was a written lease. We think otherwise. This is a law action, and the finding of the court is to be regarded the same as the verdict of a jury, which is not to be interfered with where the evidence is conflicting. There was abundant evidence on this point to sustain the finding.

1. PRACTICE
in supreme
court: find-
ing of court
considered as
verdict of
jury.

Harris v. Heackman.

II. The lease was for the term of five years, and the defendant expressly agreed to pay the plaintiff the sum of twelve dollars per month in advance. It is claimed by appellant that there was only an implied covenant to pay the rent, and that acceptance of rent by the plaintiff from the assignees of defendant discharged the defendant from further liability. But the lease is more than an implied covenant. It is an express agreement to pay the plaintiff the rent for the term, and, where there is an express covenant to pay the rent, the mere acceptance of rent from an assignee of the lease does not discharge the lessee. *Fanning v. Stimson*, 13 Iowa, 42; *Barhydt v. Burgess*, 46 Id., 476. Besides, the plaintiff testified that, when he found the other parties in the building, he "gave them a receipt for rent on the Heackman lease," and that he looked to Heackman for the rent under the lease.

III. The building on the lot was destroyed by fire. At the time the lease was executed, and at the time of the fire, there was a fire limit ordinance in force, by which the erection of a wooden building on the lot was prohibited. The rent which is claimed in this action accrued after the building was burned. It is claimed that the destruction of the building, taken in connection with the terms of the lease, terminated the lease, and that defendant is not liable. But the defendant made his contract when the fire limit ordinance was in force, and, even if it was not then in force, the burning of the building would not discharge him from his contract. *David v. Ryan*, 47 Iowa, 642.

AFFIRMED.

STATE V. HEMRICK.

1. **Practice in Supreme Court: EVIDENCE NOT IDENTIFIED.** The only way oral evidence introduced on the trial of a cause can be preserved and identified, for the purpose of an appeal to this court, is by a bill of exceptions signed by the trial judge; and certain alleged evidence in this case, not being so identified, cannot be considered.
2. —: **PRESUMPTION IN FAVOR OF INSTRUCTION.** Where an instruction in a criminal cause was good in the case of certain possible defenses, but it does not appear from the record what the defense was, this court cannot presume that the instruction was improperly given.
3. **Criminal Law: ALIBI AND INSANITY AS DEFENSES: BURDEN OF PROOF.** A defendant in a criminal cause setting up as a defense *alibi* or insanity, has the burden of proof to establish these defenses. *State v. Bruce*, 48 Iowa 530, and *State v. Hamilton*, 57 Id., 596 followed. [See also *State v. Reed*, ante 40.]

Appeal from Marshall District Court.

TUESDAY, DECEMBER 11.

INDICTMENT for robbery from the person of one Anderson. Trial by jury, verdict "guilty," judgment, and defendant appeals.

Lincoln King, for appellant.

Smith McPherson, Attorney-general, for the State.

SEEWERS, J.—This cause was submitted on written transcript. There is a paper before us which does not constitute a part of the transcript, nor is it referred to therein. It is not certified to by the clerk. It purports to set out a portion of the evidence introduced on the trial, and it is certified to by Thos. P. Dering, who states that he is the official reporter of the district court in and for the eleventh judicial district. The attorney-general insists that this paper cannot be recognized by this court, because it is not properly authenticated; and this we think must be so. The only way oral evi-

dence introduced on the trial of a cause can be preserved and identified, for the purpose of an appeal to this court, is by a bill of exceptions, signed by the trial judge. The assignment of error, therefore, argued by counsel, based upon what purports to be a portion of the evidence so certified, cannot be considered, simply because there is not sufficient proof that such evidence was introduced.

II. The transcript before us contains only the indictment, the instructions, verdict, judgment, and the proceedings of the court prior to commencing the trial. The appellant complains of the following instructions given the jury: "If the evidence offered and introduced on the part of the state, taken above, is sufficient to establish the defendant's guilt beyond a reasonable doubt, then it is incumbent on the defendant to explain the facts so proved by the state, or establish his defense, and this may be done by a preponderance of the evidence; that is, if the circumstances so proved by the defense be established by a preponderance of the evidence, it necessarily leaves the material facts in dispute reasonably doubtful. If the evidence of the state fails to show the defendant guilty, he is entitled to an acquittal, unless the evidence introduced on the part of the defendant, which you deem creditable and of any weight, so strengthens the proofs offered by the state as to leave no reasonable doubt of his guilt. If, upon the whole proof, and under all the evidence, there is reasonable doubt of defendant's guilt, he is entitled to an acquittal." The objection made to the foregoing instruction is, that the defendant is required to establish his defense by a preponderance of the evidence. Conceding this to be so, then the question is—as we do not have the evidence before us—whether the instruction can be sustained as to any possible defense relied on by the defendant. This court has held that, as to the defense of insanity, or *alibi*, the foregoing instruction would be correct. *State v. Hamilton*, 57 Iowa, 596; *State v. Bruce*, 48 Id., 530. Following these cases, the judgment of the district court is

AFFIRMED.

MARTIN V. WHISLER.

1. **Tender: ADMISSION OF LIABILITY: COSTS.** Where an action is brought upon a cause which has been merged in an award of arbitration, although no recovery could be had thereon, yet if defendant appears and pleads the award, and tenders the amount thereof, he thereby admits that the cause of action still subsists, and his liability thereon to the amount of the tender; and, so admitting, he cannot avoid the payment of the costs made upon the trial. He should have tendered the costs accrued at the time he tendered the amount of the award.

Appeal from Cass Circuit Court.

TUESDAY, DECEMBER 11.

THE plaintiff commenced this action before a justice of the peace upon an account, claiming the sum of \$78. The defendant denied any indebtedness, and alleged that the subject matter of the suit was submitted to arbitrators, who made an award that defendant should pay plaintiff \$45. The defendant tendered this sum, and deposited it in court. The cause was tried to a jury, and verdict was returned and judgment rendered for plaintiff for \$65. The plaintiff appealed to the circuit court, and the parties filed therein an agreed statement of facts, in which the plaintiff admitted that he was entitled to recover only the amount of the award and tender. The plaintiff insisted, however, that the defendant should have tendered the costs made in the justice's court to the time of the tender. In the circuit court the only controversy was as to which party was liable for the costs in the justice's court. The court found the plaintiff entitled to judgment for the sum tendered, and the costs made in the justice's court. The defendant appeals.

L. L. DeLano, for appellant.

A. S. Churchill, for appellee.

DAY, CH. J.—The court certified the question upon which

it is desirable to have the opinion of this court as follows: "Where an action was brought upon a parol contract, which had been merged in the written award of arbitrators, and in which action the defendant in his answer denied the right of plaintiff to sue or recover on the original contract, and plead the award, and deposited the amount thereof, without any costs, in the hands of the justice, on the filing of his answer, which party is liable for the costs made on the trial of the case before the justice?" The defendant insists that the tender was made upon the award, and not upon the cause of action sued upon; that the plaintiff could not have recovered upon the cause of action sued upon, and that, consequently, it was not necessary for the defendant, in order to avoid the payment of costs, to tender the costs accrued at the time of the tender. The defendant, however, made a tender in the action, and thus admitted liability upon the cause of action sued upon, to the extent of the tender. It may be that, if the defendant had relied upon his denial of the plaintiff's cause of action, he could have prevented the plaintiff from recovering thereon. But, having made a tender of a sum which he admits to be due, he should, in order to avoid liability for costs, have tendered the costs which had accrued at the time of the tender. See *Freeman v. Fleming*, 5 Iowa, 460; *Warrington v. Pollard*, 24 Id., 281; *Barnes v. Greene*, 30 Id., 114. Under the facts certified to us by the court below, the defendant is liable for the costs made in the justice's court.

AFFIRMED.

CURTIS V. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY.

1. **Railroads: RIGHT OF LAND-OWNER TO OPEN CROSSING: BURDEN TO ESTABLISH.** A farmer is not, as a matter of course, entitled to an open crossing for his stock over the track of a railway which traverses his pasture, regardless of all other means of crossing; and, before he can demand such open crossing, he must show, at least, that he has no other adequate means for transferring his stock from one side to the other of the track. The plaintiff having failed to bring up all his evidence on this appeal, this court cannot say that the court below erred in finding that he was not entitled to the open crossing demanded by him.

Appeal from Scott Circuit Court.

TUESDAY, DECEMBER 11.

THIS action was brought to compel the defendant to put in an open crossing and a cattle guard at a point designated by him in a notice served by him upon the defendant. The court dismissed the plaintiff's petition, and rendered judgment for the defendant for costs. The plaintiff appeals.

Geo. E. Hubbell, for appellant.

Grant & Grant, for appellee.

ADAMS, J.—The abstract does not purport to contain all the evidence. The court made certain findings of fact, and we shall assume that they were supported by the evidence. The court found, in substance, that the defendant's track crosses the plaintiff's pasture; that the plaintiff requested the defendant to construct an open crossing at the place designated in a notice served; that the defendant refused to do so; that it had fenced the track on both sides, and put in gates, and claimed that that was sufficient; that an open crossing with cattle guards might have been put in at a reasonable expense, but not a bridge or tunnel; that the plaintiff was not cut off from the highway; that his only

ground for asking for an open crossing was to be saved the inconvenience of opening and shutting the gates when driving his cattle from one part of the pasture to the other; that the only objection made by the plaintiff was that the crossing was not an open one. The court also found as a conclusion of law that, "under the circumstances, the crossing provided by the defendant was adequate, and all that is required by law, so far as regards the question of being open or not."

I. The plaintiff assigns as error that the court erred in its finding that the only objection made by the plaintiff to the crossing was that it was not an open one.

The petition and evidence set out do not clearly show whether the fact that the crossing was not an open one constituted the plaintiff's only objection or not. It appears clearly enough that he demanded cattle guards. But such demand seems to have been made in connection with his demand for an open crossing. It is not shown that he demanded a crossing with gates and cattle guards; and, as the abstract does not purport to contain all the evidence, we cannot say that the court erred in finding that the plaintiff's only objection was that the crossing was not an open one. We shall assume, then, that the plaintiff's demand for cattle guards was to obviate the necessity of gates, and render an open crossing practicable and proper.

II. We come, then, to the question as to whether the crossing at the place where made, not being an open one, was adequate. We do not feel called upon to determine whether under any circumstances a farmer, whose pasture is crossed by railroad track, is entitled to an open crossing for the mere accommodation of his stock. The defendant contends strenuously that he is not. There would certainly be a grave objection to a crossing in a pasture that would allow cattle to enter upon the track and stop there. It would unquestionably be a source of danger. But, without going to the extent which the defendant contends that we should, we have to say that we do not think that it follows as a matter of course

Hildreth v. Harney.

that a farmer is entitled to such crossing for cattle, regardless of all other means of crossing. The burden was upon the plaintiff to show, at least, that he had no other adequate means, and, if he desired his case reviewed upon errors without the evidence, or without all the evidence, as he seeks in this case, he should have asked the court to find that he had no other adequate means, or, at least, to find what other means he had. As to what other means the plaintiff had, the findings are silent. We might rest the case here, but we think best to say that the evidence set out shows that there was a good enough crossing near by under a railroad bridge, except that in wet seasons it sometime became impassable. But how often it became impassable is not shown, nor how long it remained so, nor to what extent inconvenience was suffered. It is, however, shown that there was not only a railroad bridge for a crossing, but there was a highway boundary of the pasture. What other means the plaintiff had for transferring his stock from one side of the pasture to the other, we do not know. He has not allowed us to say that we are in possession of all the facts, and yet, with the burden of proof upon himself, he asks us to hold that the crossing complained of is inadequate. He asks it for the reason that it is not an open one. We do not think that we should be justified in so holding.

AFFIRMED.

HILDRETH V. HARNEY.

- 1. Judgment: ON PETITION FILED TOO LATE: NOT VOID.** Where a petition is filed on a day later than that named in the original notice, it is proper for the court to discontinue the cause; and it is error to refuse to dismiss such a petition; but a judgment recovered upon a petition filed too late is not void, and cannot be collaterally impeached. The irregularity must be corrected by appeal, or in some other direct method known to the law.

62	420
89	485

62	420
127	474

Appeal from Polk Circuit Court.

TUESDAY, DECEMBER 11.

THE plaintiff brings this action in equity to quiet his title to certain forty acres of land. The court entered a decree for plaintiff as prayed in the petition. The defendant appeals. The material facts are stated in the opinion.

Detrick & Snell, for appellants.

Barcroft, Bowen & Sickmon, for appellee.

DAY, CH. J.—The plaintiff derived his title to the lands in controversy through the foreclosure of a mortgage executed thereon by David R. Harney, the father of the defendant. The mortgage was foreclosed after the death of David R. Harney, and his widow and children, including the defendant, were made parties to the foreclosure proceeding. The original notice was served personally on the 7th day of December, 1867, and notified the defendants “that there is now on file in the office of the clerk of the district court of Polk county, Iowa, the petition of John M. Harney,” claiming of them the foreclosure of the mortgage in question. The petition in the foreclosure proceeding was not in fact filed until January 22, 1868. The defendant claims that, because of the failure to have the petition on file at the time mentioned in the notice, the court failed to acquire jurisdiction, and the decree of foreclosure is void. Section 2600 of the Code provides that, if the petition is not filed by the date fixed in the notice, the action will be deemed discontinued. Under this section, it has been held that it was proper for the court to discontinue a cause, where the petition was not filed within the time mentioned in the notice. *Hudson v. Blanford*, 22 Iowa, 323. It has also been held that it was error to refuse to dismiss a petition which was not filed until after the time specified in the notice. *Cibula et al. v. Pitt’s*

Tuttle v. The Ind. School Dist. of Harlan et al.

Sons' Manufacturing Co., 48 Iowa, 528. It has never, however, been held that a judgment recovered upon a petition filed after the time named in the notice is void, and liable to collateral impeachment. Upon the contrary, in *Brown v. Mallory*, 26 Iowa, 469, referring to the question now under consideration, in connection with other matters, it is said: "It is not necessary to consider these various matters, for they amount to irregularities which do not operate to avoid the judgment, and must be corrected by appeal, or in other ways pointed out by the statute." In our opinion, the failure to file the petition within the time named in the notice does not render the judgment void.

The judgment of the court below is

AFFIRMED.

TUTTLE V. THE IND. SCHOOL DIST. OF HARLAN ET AL.

DAVIDSON ET AL. V. SAME AND ROBERTSON, INTERVENOR.

1. **Contract to Build House: ABANDONMENT OF BY CONTRACTOR AND ASSIGNMENT TO SURETIES: EQUITIES AS BETWEEN SURETIES AND CREDITORS.** Where a building contractor abandoned his work, and, for the purpose of protecting his sureties, assigned his contract and turned over the work to them, with the understanding that they should finish the building, and with the money received upon the contract pay for the materials and labor furnished, and account to him for the profits, if any, *held* (1) that "the materials and labor furnished" had reference to what should be furnished at the times the several installments became due under the contract, and not to what was furnished at the time of the assignment; (2) that the sureties became trustees for the completion of the work, and that, as such, they had the right to use the money arising from the contract to execute their trust; that is, to complete the building; and that persons who had, prior to the assignment, furnished materials to the contractor, could not in equity, without having established a prior lien, demand the contract money needed to complete the building, for the purpose of paying the contractor's indebtedness to them for the material so furnished; (3) that the equities were no stronger of a material-man who held an order, given by the contractor before his assignment, upon an installment of the contract money, which did not become due until it had been earned by the work and expenditures of the trustees.

Tuttle v. The Ind. School Dist. of Harlan et al.

Appeal from Shelby District Court.

TUESDAY, DECEMBER 11.

ACTION in equity to establish an equitable right to a certain fund. There was a decree for the defendants. The plaintiffs and intervenor appeal.

Wright, Cummins & Wright, A. K. Riley and D. O. Stuart, for appellants.

Smith & Cullison, Platt Wicks and Dyer & Fitchpatrick, for appellees.

ADAMS, J.—The fund in controversy is in the hands of the Independent School District of Harlan. It is money due from the district for building a school house. The district occupies a neutral position, and is ready to pay the money to such person or persons as the court shall determine to be entitled to it. The plaintiffs in the respective actions and the intervenor claim the fund as against the defendants, J. A. Fitchpatrick, A. K. Banks, J. A. King, J. F. Myers and L. Soderland.

In July, 1881, Solon Bryan, who is made defendant herein, entered into a contract to build a school house for the Independent School District of Harlan. At the same time he gave the district a bond for the performance of his contract. Fitchpatrick, Banks, King, Myers, and Soderland were sureties upon the bond. Bryan commenced work soon after the execution of the contract, and continued until after four estimates were made and paid, the last estimate in his favor being dated November 30, 1881. After that, Bryan's work proved to be unsatisfactory, and the architect and superintendent, William Foster, refused to give Bryan another estimate, and notified the sureties of Bryan's failure to do satisfactory work, and that he had refused to give him a fifth estimate. The sureties, in order to protect themselves, took from

Bryan, in February, 1882, an instrument, by which he assigned to them his interest in the contract with the district, and authorized them to receive all money due or to become due under the contract, providing, however, that they should receive the same "for the purpose only of paying for material and labor furnished in the said building," and the profits, if any, were to be paid to Bryan.

In the following month they took from him another instrument, by which he conveyed to them all the material on the ground, and all his interest in the contract, without any reservation as to profits. Bryan at the same time turned the work over to them, and they proceeded and completed the building. The job proved to be an unfortunate one. The contract price was \$18,000. The district paid Bryan \$8,415 on the estimates given to him, leaving only \$9,585 to be paid afterwards; and the completion of the building cost \$13,750. The sureties, appellees herein, claim that, under the assignment from Bryan, they are entitled to what remains due from the district, and that they need it all, and more too, to save themselves from loss. The plaintiffs and the intervenor, Robertson, appellants herein, are creditors of Bryan, having become such for material furnished for the building, and they claim what remains due from the district, or so much thereof as may be necessary, to pay them as such creditors.

Under the first contract between Bryan and the appellees, they were to receive the money due and to become due from the district, and use the same "for the purpose of paying for the material and labor furnished," and paying to Bryan the profits, if any. The appellants contend that the parties meant, by "material and labor furnished," the material and labor furnished prior to the execution of the contract, and that only. But we do not think that this position can be sustained. If that was all that the parties meant, it would appear that a disposition of a portion of this money was unprovided for. We think that, by "material and labor furnished," the parties meant material and labor furnished at

the time the money should be received. This construction violates no grammatical rule, and it makes the contract reasonable and consistent. Had there been profits, as the first contract between Bryan and the appellees contemplated was possible, it seems to us that the rights and obligations would have been clear. By profits was meant, of course, what the contract price should exceed the entire cost. The appellees should, we think, if there had been money enough, have paid whatever was due to any one as part of the cost, and the balance as profits to Bryan. The appellants should, we think, in such case have been paid. But the cost appears to have exceeded the contract price; and, what is more, the amount to be paid the appellees was not sufficient to pay the cost *incurred by them*.

The question presented is as to whether the appellants, as creditors of Bryan, have a right to be paid out of the fund remaining in the hands of the district, notwithstanding the appellees are short in any event, and such payment would increase their shortage. In our opinion they have not. Whatever obligation, if any, was assumed by the appellees in favor of the appellants, was assumed by them as trustees. Now, trustees may always be allowed their proper expenditures made in the execution of their trust. The execution of the trust in question required the completion of the building. Fifteen per cent of the contract price had been reserved to be paid only upon the completion of the building. The reserved fifteen per cent earned by Bryan appears to have been, at the time he abandoned the work, in a substantially wrecked condition. The appellees undertook to save it for him and his creditors. To do so, it was necessary for them to incur liabilities and make advances. They did save it. But, unfortunately, the trust fund is insufficient to pay the claims charged on it. This, however, is not the fault of the appellees. They have saved the fund that was in peril, and earned the balance. As they have made no expenditures except in the legitimate discharge of their duty,

it seems to us that it would be a harsh rule to hold that their right to reimbursement is inferior to that of mere beneficiaries under the provisions of the trust which they assumed. It is contended, to be sure, by the appellants, that they are not such mere beneficiaries; that they had an equitable claim upon the fund before the trust was assumed, and which still exists independent of any contract between the appellees and Bryan. This theory is predicated upon the fact that the appellants furnished material which went into the building, and by reason of which the fifteen per cent reserved from Bryan's estimates was earned in part.

But it is not contended that appellants acquired any lien; and their mere equity we have already determined is inferior to that of the appellees, because the reserved fifteen per cent was saved only by the expenditures made by the appellees.

Wm. Davidson & Bros. set up a claim, which, in one respect, is different from that of the other appellants. They hold Bryan's order, drawn upon the district before the appellees took any assignment. They contend that the amount of their claim was set apart and virtually assigned to them by Bryan out of money to become due from the district, and that no assignment afterward to the appellees could affect their claim. This order, however, was made payable out of the fifth and sixth estimates, and these estimates never became due to Bryan. He never so far fulfilled his contract as to become entitled to them. An order certainly cannot operate as an assignment of a fund not due the drawer when the order is drawn, nor afterward.

In our opinion, the court did not err in dismissing the appellants' petitions.

AFFIRMED.

WESTFALL V. MADISON COUNTY.

62	427
79	329
62	427
6125	294

1. **Witness: SUBPŒNAED FROM WITHOUT THE STATE: MILEAGE: LIABILITY OF COUNTY IN CRIMINAL CASE.** Where a witness is subpoenaed from beyond the jurisdiction of the court, while in a civil case his mileage in reaching the court's jurisdiction could not be taxed to the party who did not subpoena him, he might recover it from the party who did subpoena him, as for service rendered and expense incurred at his request. And in a criminal case, where he is subpoenaed from beyond the state lines to testify on behalf of the state in a case where the defendant is found not guilty, if he obeys the subpoena, he may recover of the county, in addition to his per diem and mileage within the state, mileage at the same rate for the distance from his place of residence to the state line.

Appeal from Madison Circuit Court.

TUESDAY, DECEMBER 11.

A SUBPŒNA was issued by the district court of Madison county, directed to one Potter, a resident of Pittsburg, Pa., where the same was served, requesting him to appear in said court and testify upon the part of the state in a criminal action. Potter obeyed the subpoena and testified. The defendant in the action was found not guilty, and it was adjudged that the defendant in this action should pay the costs in the criminal action. Potter claimed that he was entitled to mileage from Pittsburg, but his claim in this respect was disallowed by the defendant, and Potter assigned his claim to the plaintiff. This action was brought to recover the mileage aforesaid. The court found for the defendant, and the plaintiff appeals.

J. B. W. Westfall and *George E. McCaughan*, for appellant.

Ruby & Wilkin, for appellee.

SEEVERS, J.—The single question to be determined is

whether Potter is entitled to mileage from Pittsburg. If he is, then the judgment of the court is erroneous.

It will be conceded that, in a civil action, when a witness has been subpoenaed by one party in another state, the mileage or distance traveled to reach the state line cannot be taxed as a part of the costs against the other and losing party. But we are not prepared to say that such witness could not recover of the party at whose instance he performed the service a reasonable compensation therefor, based upon the distance traveled, and the length of time he was engaged. The service of the subpoena out of the state at the instance of a party should, we think, be regarded as a request. The general rule is that, when one person performs services at the request of another, he is entitled to compensation from the latter.

While, in the case at bar, the attendance of Potter could not have been coerced, yet we think the service of the subpoena should be regarded as a request upon the part of the state that he would attend the term of court at the time and for the purpose stated in the subpoena.

He complied with such request, and, therefore, an implied promise on the part of the state to pay him a reasonable compensation must be presumed. The responsibility of the state being fixed, the statute provides that the same shall be paid by the county in cases where the defendant in a criminal action has been adjudged not guilty. Code, § 3814. Potter was undoubtedly entitled to compensation for daily attendance, and probably for the distance traveled in the state. Code, § 4561. As we understand, the defendant has admitted its liability to this extent, and has paid or tendered such amount. The statute provides that witnesses shall receive compensation "for actual travel per mile, each way, five cents." Code, § 3814.

As Potter came from Pittsburg at the request of the state, and did not do so officiously and on his own motion, we think he should be compensated under and in accordance

Loan v. Etzel.

with the foregoing statute. We think public policy, and the due and proper administration of the criminal law, demand that such should be the rule.

The constitution requires that the accused in criminal actions shall "be confronted with the witnesses against him." Art. 1, § 10, of the Constitution. We understand this to mean that the witnesses on the part of the state shall be personally present when the accused is on trial. To prevent failures of justice, the attendance of witnesses in such cases should, at least, be so far encouraged as to require the state and counties to pay them a reasonable compensation, when they voluntarily, but at the request of the state, come here for the purpose of testifying on the part of the state in criminal actions.

Counsel have cited authorities bearing to an extent, at least, on the question under discussion.

They cannot be regarded as decisive, and, after a careful consideration, we are of the opinion that the rule herein declared is the better one, and more in accordance with our constitution, statute and policy than the reverse would be.

REVERSED.

LOAN v. ETZEL.

1. **Intoxicating Liquors: UNLAWFUL SALE OF: LIEN UPON BUILDING AS AFFECTED BY OWNER'S KNOWLEDGE.** In order to the establishment of a lien upon the building in which intoxicating liquors are unlawfully sold, under § 1558 of the Code, the consent of the owner to the unlawful sales need not be shown by any positive and affirmative act, but may be inferred from circumstances, and from knowledge of the illegal sales under such conditions as properly to call forth a protest, and a failure to make any objection. See *Putney v. O'Brien*, 53 Iowa, 117.

Appeal from Iowa District Court.

TUESDAY, DECEMBER 11.

THE plaintiff commenced an action to recover of one Peter

Hiney damages for the alleged unlawful sale of intoxicating liquors to Henry Loan, the plaintiff's husband. In an amendment to the petition, the plaintiff alleged that Peter Hiney used and occupied certain premises described, owned by the defendant, Etzel, and others, for the purpose of selling intoxicating liquors therein, with the consent and knowledge of the owners, and sold on said premises intoxicating liquors to said Henry Loan. The plaintiff prays that the judgment recovered against Peter Hiney may be declared a lien upon said premises. On the 7th day of April, 1877, judgment was rendered against Peter Hiney for \$600 and costs, and the cause was continued as to Anna Etzel. Subsequently, by agreement of parties, the cause as to Anna Etzel was referred to Hon. L. B. Patterson, to report the evidence and conclusions of law and fact. Upon the report of the referee, judgment was rendered against the plaintiff for costs. The plaintiff appeals.

Milton Remley and A. E. Swisher, for appellant.

H. F. Bonorden, for appellee.

DAY, CH. J.—The referee reported his findings of facts and conclusions of law as follows:

"1st. I find that Anna Etzel, the defendant, was the part owner of the premises described in the plaintiff's petition, to-wit: Thirty feet off the south end of the north half of lot No. 5, in block No. 65, in Iowa City, Johnson county, Iowa.

"2d. That said property was rented by the said Anna Etzel sometime in 1873 to Peter Hiney, to keep a saloon therein, which was kept therein for three or four years, and that said Etzel had knowledge that there were illegal sales of liquor made therein during said lease.

"3d. That during said time the said Peter Hiney sold and permitted to be sold on said premises intoxicating liquors,

in violation of the law, to divers persons, and to one Henry Loan during his lifetime.

"4th. The plaintiff, Mary J. Loan, as widow of Henry Loan, commenced suit against Peter Hiney on the 1st day of September, 1876, claiming damage for such illegal sale to her husband. That, at the same term of court, the defendant, Anna Etzel, with divers others, were made defendants, but afterwards proceedings were discontinued as to all the other defendants. On the 7th day of April, 1877, judgment was rendered against Peter Hiney for the sum of \$600, with six per cent interest and costs, and the interest of Anna Etzel in the above described premises was held subject to said judgment.

"5th. I find that the defendant, Anna Etzel, did not affirmatively consent to the illegal sales made by the said Peter Hiney, while he was occupying the premises of the defendant. I therefore find as a conclusion of law that the interest of the defendant, Anna Etzel, in the real estate above described, is not liable to the lien as claimed by the plaintiff, subjecting the same to the judgment recovered by the plaintiff against Peter Hiney for the sum of \$600, as above described."

It will be observed that the referee makes no finding as to whether Anna Etzel had actual knowledge of the illegal sales to Henry Loan, upon which the judgment was rendered. Upon this branch of the case there is a conflict of evidence, although it preponderates very strongly in favor of the conclusion that she had such knowledge. Still, if the referee had found from the evidence that she had not such knowledge, we might feel ourselves precluded from going behind his finding upon a question of fact. But the referee has based his legal conclusion upon a finding that Anna Etzel did not *affirmatively* consent to the illegal sales made by Peter Hiney. The referee seems to have been of opinion that, in order to the establishment of a lien upon the building in which intoxicating liquors are unlawfully sold, the

owner must, by some positive act, indicate his assent to the unlawful sale. This is evident from the following language employed by the referee in assigning reasons for his conclusion: "This assent must be indicated in such a clear manner that a court would have no hesitation in finding that he was a *particeps criminis*. There should, at all events, be something done by the defendant, indicating an affirmative acquiescence in the commission of the wrong." The referee cites and relies upon *State v. Abrahams*, 6 Iowa, 117, and *State v. Ballingall*, 42 Id., 87. The former of these cases was a criminal prosecution for knowingly permitting a lessee of a house to use it as a place of resort for purposes of prostitution and lewdness; and the latter case was a criminal prosecution for keeping a room in which defendant kept intoxicating liquors for sale in violation of law. The rule of these cases is not applicable to the case at bar. Section 1558 of the Code provides: For all fines and costs assessed or judgments rendered against any person for any violation of the provisions of this chapter, the premises and property, personal or real, occupied and used for that purpose, with the consent and knowledge of the owner thereof, or his agent, by the person manufacturing or selling intoxicating liquors contrary to the provisions of this chapter, shall be liable. The consent of the owner need not be shown by any positive or affirmative act, but may be inferred from circumstances, and from knowledge of the illegal sales under such conditions as properly to call forth a protest, and a failure to make any objection. For circumstances under which the assent of the owner was implied, see *Putney v. O'Brien*, 53 Iowa, 117. The referee erred in his view of the law as to what was necessary to constitute consent; and, in affirming the referee's report and rendering judgment thereon, the court also erred.

REVERSED.

CARSON V. THE GERMAN INSURANCE COMPANY.

1. **Insurance: FORFEITURE OF POLICY BY NON-PAYMENT OF PREMIUM: FACTS NOT CONSTITUTING.** Where defendant issued and sent by mail to the plaintiff a policy of insurance on his drug-store, and with it sent a letter stating that its agent, M., would call upon plaintiff in a few days and settle for the policy, and, when M. called at plaintiff's place of business to make settlement and collect the premium, plaintiff was not at home, and M. requested plaintiff's son to tell plaintiff to forward the premium to the company, and it would be all right, *held* that plaintiff had a reasonable time, after being notified by his son, within which to forward the premium; that such reasonable time was determined by all the circumstances in the case, including the former dealings between the parties in respect to like business; that the defendant had no right to cancel the policy for the non-payment of premium before the expiration of such reasonable time; and that, a loss having occurred within that time, after notice to plaintiff that the policy had been canceled, and before the premium had been tendered, defendant could not avoid liability upon the policy on the ground that it had been canceled for the non-payment of the premium, notwithstanding a clause in the policy that it should be void if the premium should be unpaid.
2. —: **WAIVER OF PROOFS OF LOSS.** Where a policy of insurance required that proofs of loss should be furnished to the company within thirty days after it occurred, but within that time the company informed the insured that the policy had been canceled prior to the loss, and that it would pay nothing thereon, *held* that this was equivalent to saying to the insured that he need furnish no proofs, as the loss would not be paid if he did; and to an action on the policy the failure of the insured to furnish proofs of loss within the thirty days was no valid defense.
3. **Evidence: ADMISSION OF: ERROR WITHOUT PREJUDICE.** The admission of irrelevant evidence is no ground for reversal where it clearly appears that the appellant could not have been prejudiced thereby.
4. **Verdict: INTEREST ON TO DATE OF JUDGMENT.** A party in whose favor a verdict has been rendered is entitled to interest thereon from the date of its return to the date of judgment thereon.

Appeal from Linn District Court.

WEDNESDAY, DECEMBER 12.

THIS is an action upon a fire insurance policy. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendant appeals.

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62	433
108	390
62	433
125	260

Carson v. The German Insurance Company.

Mills & Keeler and W. E. Blake, for appellant.

H. Boies and Preston Bros., for appellee.

ROTHROCK, J.—The plaintiff is a practicing physician, residing at Mount Vernon, in this state. He owned a brick building, occupied as a drug-store and doctor's office, and, on the 23d day of April, 1877, the defendant issued to him a policy of insurance for one year upon the property, and the same was continued in force by successive renewal receipts down to April, 1880, when the company issued and mailed to him the policy in suit, together with the following letter:

“OFFICE OF THE GERMAN INSURANCE CO.,
“FREEPORT, ILL., APRIL, 19, 1880. }

“*Jas. Carson, Esq.*,

“*Mt. Vernon, Iowa—*

“*Dear Sir:—Please find policy on your property inclosed herewith. Mr. Marker will be in your vicinity soon, and will call and settle for same with you.*

Truly yours,

“F. GUND, *Secretary.*”

Carson accepted the insurance upon the terms stated in the policy and letter. The company had no local agent at Mt. Vernon. Adam Marker was their traveling agent. He had procured the original policy, and collected some of the premiums on previous renewals, and his residence was at Freeport, Illinois. His general authority as an agent of defendant only authorized him to receive and forward applications for insurance, and to collect and transmit premiums therefor. On the 15th of September, 1880, Marker went to Mt. Vernon to collect the premium of ten dollars on the policy in suit. During business hours in the forenoon of that day, he called at Dr. Carson's office and usual place of business, and, he being absent from town, the payment of the premium was requested of his son, who was his partner and the person in charge of his office. The plaintiff's son refused

payment, upon the ground that his father was away from home, and he knew nothing about the matter. Marker returned to Freeport on September 17th, and reported the result of his trip, and on the 22d day of that month the secretary of the company canceled the policy upon the company's books, as follows: "Canceled, Sept. 22, 1880, for non-payment of premium."

On the evening of September 22d the plaintiff's son informed him that Marker had been there to collect the premium due on the policy. The next morning plaintiff went into the country to attend to some patients, and upon his return in the afternoon he received a dispatch calling him to Logan, Harrison county, Iowa, in consultation, and he left for that place on the first train. The property was totally destroyed by fire on that night. The plaintiff reached home on the morning of the 25th of September, and immediately telegraphed the fact of the loss to the company at Freeport, and on the same day he received the following reply:

"THE WESTERN UNION TELEGRAPH Co., }
"DATED FREEPORT, ILL., SEPT. 25, 1880. }

"*To Jas. Carson*:—Your insurance is canceled on our books for non-payment of premium. Can do nothing for you.

"F. GUND, *Secretary*."

Carson made out proofs of loss, but did not serve them on the company until after the expiration of the thirty days stipulated in the policy. No tender of the premium was made until forty or fifty days after the loss, and, when made, it was refused. In defense to the plaintiff's claim, the company pleaded—

First. That prior to the loss plaintiff's policy was canceled on its books for non-payment of premium, of which he had notice.

Second. That no proofs of loss were furnished within thirty days after said fire, as provided by the terms of the policy; and that no proofs under the policy in suit were ever presented by the plaintiff, or waived by defendant.

 Carson v. The German Insurance Company.

Third. That at the time of such loss the premium of ten dollars for said policy was due and unpaid, and, by reason thereof, the policy was by its terms suspended, and defendant is not liable thereon.

The above facts in the case are not in dispute. They are in substance and, indeed, to some extent, in the language of the statement of facts made in the argument of appellant's counsel. It is claimed by appellant that the principal question presented by this appeal arises under the third defense.

1. INSUR-
ANCE: for-
feiture of
policy by non-
payment of
premium:
facts not con-
stituting.

The policy in suit, after enumerating certain contingencies which would render the contract void, proceeds as follows: "Or if the premium shall be unpaid, then, and in every such case, the policy shall be void, and the insured shall not be entitled to recover from the company any loss or damage which may occur to the property hereby insured, or any part or portion thereof." A literal interpretation of this clause in the policy would exempt the company from liability, if the premium should be unpaid at the time of the loss, even if at that time it was not due. But such a construction could not have been intended by the parties. Suppose that at the time the policy was issued Carson's note had been taken for the premium payable in three months, and within that time the loss had occurred; it surely would not be claimed that the policy was suspended, and that the company was not liable. In these latter days many insurance companies have adopted the credit system in the transaction of their business with the public. They give time for the payment of premiums, and take promissory notes therefor, and provide in the policy that, when the premium becomes due and remains unpaid, the default in payment shall operate as a suspension of the policy, and that, upon payment being made, the policy shall be revived; and contracts of insurance of this character have been sustained by the courts.

In the case at bar, however, this question of temporary suspension is one neither proper nor necessary for discussion,

because there was no suspension of the policy. It was absolutely canceled by the company, and it was canceled, not because the company did not desire to carry the risk, but for non-payment of the premium. And we think the rights of the parties in this case turn upon the question whether the company had any right under the facts to terminate the contract at any time before the loss. Or, in other words, was the jury required, under the facts in the case, to find that the premium was overdue and unpaid at the time of the loss, and was the company for that reason justified in canceling the policy when it was canceled. To determine this question, the policy and the letter which accompanied it must be construed together. The defendant sent these to the plaintiff as its obligation, and the plaintiff accepted the offer and relied upon it. The insurance was a valid insurance, and so remained until the fire, unless it was terminated by the default of the plaintiff in not settling with Marker. It is proper to say, in the first place, that it is entirely immaterial what authority Marker had as an agent of the company as to other insurance. In this instance he was authorized to settle with Carson for the policy. Being thus authorized, suppose he had found Carson in his office when he called, and, Carson being out of funds, he had gone away saying he would be back on his next trip in a few weeks, and that Carson could then pay. We think in such a case, if a loss should occur in the interim, the company would be liable. We cannot subscribe to the doctrine contended for by counsel for appellant, that, if Marker called at the office of plaintiff in his absence, and demanded payment, and payment was refused, this, without notice to the plaintiff, and without unreasonable delay on his part to make payment, authorized the company to rescind the contract for that reason. The modern methods of securing business by insurance companies by canvassing and collecting, and the adoption of the credit system, and the temporary suspension of policies in case of over-due premiums, preclude the idea that the appearance of Marker at plaintiff's office in

his absence, and a demand of payment of the person in charge, should be regarded as a demand for the performance of one of two concurrent acts, to be performed by two parties, or as a demand upon promissory notes, bills of exchange, or the like. But, aside from this, the jury were warranted in finding from the evidence that Marker left word with plaintiff's son to tell his father to send the money to the company, and it would be all right. And the court, we think, correctly instructed the jury that "a mere request by defendant's agent, left with another at plaintiff's office in his absence, that plaintiff should forward the premium in question to defendant's home office, is insufficient to constitute a defense to this action, unless you find that such request was accompanied by definite notice to plaintiff that a failure to forward such premium immediately, or within a given time, would invalidate said policy; and further find that such notice was brought to plaintiff's knowledge, and that he neglected to comply with defendant's request for an unreasonable time after the same was communicated to him." The jury were further warranted in finding that there was no unreasonable delay between the time the plaintiff was advised that the premium had been called for and the loss. We need not cite the facts which justified this finding. We may say, however, that we think the manner of making the previous payments to the defendant for insurance on the same property was competent evidence, as bearing upon the question as to the understanding of the parties to the contract.

It is urged that the court failed to fully state to the jury the issues in the case; that the issue as to the cancellation of the policy was not stated in the instructions. It is true, the court did not state this as a distinct issue. But the jury was instructed that defendant averred that plaintiff failed and refused to pay to defendant the premium of ten dollars for said policy. This was a statement in plain language of all there was in that branch of the case, and it was wholly immaterial whether the policy was canceled or suspended. The whole

controversy, so far as the original liability was concerned, turned upon the question as to whether or not plaintiff was in default in making payment of the premium, and the instructions were sufficiently explicit, and all the principles of law applicable to this part of the case were fairly and fully stated to the jury.

Upon the question as to the waiver of the proofs of loss, the court instructed the jury as follows:

“7. If you find from the evidence, that, after the issuing
2. ———: of the policy in question, and before its termina-
waiver of proofs of loss. tion, the property insured thereby was destroyed
accidentally by fire; and further find that its value exceeded the insurance thereon; and further find that on the day following such destruction plaintiff telegraphed to the secretary of defendant, at its home office in Freeport, Ills., the fact of the destruction of such property by fire; and further find that immediately thereafter, and before the time within which plaintiff was bound by the terms of said policy to furnish defendant proofs of loss, the defendant repudiated its contract of insurance, and denied all liability upon the policy in question, solely upon the ground that plaintiff had failed to pay the premium due upon such policy; and further find that defendant has at all times since repudiated said contract of insurance, and denied all liability thereon solely upon such ground, then you are instructed that such acts of defendant amount in law to a waiver of the condition in said policy that proofs of loss shall be furnished, and defendant cannot now insist upon the failure of plaintiff to furnish such proofs as a defense to this action. The burden of proof is on the plaintiff to satisfy you by a preponderance of evidence that he did so notify defendant of said loss, and that defendant repudiated the alleged contract, and, unless he does so satisfy you, your verdict will be for defendant.” This instruction is objected to by appellant, because it does not place the waiver upon the ground of estoppel. The substance of this instruction is, that an unqualified repudiation of the contract, upon

the ground that plaintiff had failed to pay the premium, was a waiver of the preliminary proofs. It is conceded by appellant that an absolute denial of liability has generally been held to waive the preliminary proofs of loss; but it is claimed that the waiver is placed upon the ground of estoppel, as where defective or incomplete proofs have actually been furnished, and the assured has neglected to amend or complete such proofs within the time stipulated, solely by reason of the company's denial of liability. In *Flanders on Insurance*, 542, 543, it is said that "the refusal to recognize the existence of any claim, or a general refusal to pay, renders the delivery of notice and proofs of loss a useless ceremony, and it is treated as waiving a strict compliance with the condition as to preliminary notice and proofs, both in respect to form and title." We are unable to see how an unqualified denial of liability can be held to be a waiver of preliminary proofs of loss upon the ground of estoppel. The insured is not induced by the denial of liability to change his position or alter his conduct. He is in effect informed by the company that he need not prepare his proofs, as the loss will not be paid if he does. See *Taylor v. Insurance Company*, 9 Howard, 390. It is said that this instruction is also erroneous, because, under it, the jury were authorized to find that the defendant at all times repudiated the contract of insurance, and denied all liability, solely on the ground that plaintiff had failed to pay the premium. It is claimed that there was no evidence that any communication whatever passed between the company and Carson during the thirty days after the loss, except the telegram, and any denial of liability thereafter could not affect the question of waiver. It is said that the company neither denied nor admitted any liability. This part of the instruction was correct. The telegram was a positive and unqualified refusal to recognize any liability, because of the non-payment of the premium. It was never afterwards modified or withdrawn. It was a standing repudiation of any claim upon it, and the jury could well find under the evidence

that the company at all times refused to recognize the claim upon the ground therein stated.

An objection is made because the plaintiff was permitted to introduce in evidence a certificate of a notary public near-

3. EVIDENCE:
admission of:
error without
prejudice.

est to the place of loss, certifying under seal that the loss was a *bona fide* one in all respects. It is said that this certificate was on the same sheet of paper with certain proofs of loss. This evidence should not have been introduced. The plaintiff did not rely in his pleadings on any proofs of loss. There were no proofs of loss of any kind, defective or otherwise, served on the defendant within the time required by the policy. But this evidence was no prejudice to the defendant. It had denied any liability, and thereby waived proofs of loss, and the cause was tried and submitted to the jury, not upon any evidence of such proofs, but upon a waiver thereof.

The policy was for \$1,000. The verdict was for \$1,091, which, it is claimed, included interest from the time when the proof of loss was waived. Upon the motion for a new trial, the court required the plaintiff to remit three months' interest and ten dollars due upon the policy, which was done. Judgment was then entered upon the verdict for \$1,091 and costs. It is claimed that judgment should not have been rendered for the full amount of the verdict. It appears that the verdict was returned April 1, 1882. The motion for a new trial was overruled, and judgment entered, November 4 of the same year. The plaintiff was entitled to interest on \$1,000 from

4. VERDICT:
interest on to
date of judgment.

the rendition of the verdict until the judgment was rendered. It does not appear from the abstract that this interest was taxed as part of the costs. If it was not so taxed, the judgment is not too large. In any event, the mistake, if any, can readily be corrected in the court below.

AFFIRMED.

PORTER V. STONE ET AL.

1. **Practice in Supreme Court: VERDICT: EVIDENCE TO SUPPORT: DEFECTIVE ABSTRACT.** This court cannot consider whether or not a verdict is supported by the evidence where the evidence is not all before the court; and the printing in the abstract of the certificate of the judge, showing that all the evidence is preserved of record, is not of itself sufficient to show that the abstract sets out all the evidence.
2. **Evidence: ADMISSIBILITY OF: FALSE REPRESENTATIONS MADE TO THIRD PARTIES.** In an action based upon alleged false representations made by defendants to plaintiff, whereby plaintiff was induced to enter into a contract of agency to his damage, evidence that defendants had made similar representations to others, with whom they were seeking to make similar contracts of agency, was admissible to corroborate the testimony of plaintiff as to the representations made to him.
3. ———: **FALSE REPRESENTATIONS: MATERIALITY OF.** Where defendants, in order to induce plaintiff to become their agent for the sale of fence posts, falsely represented that the posts were manufactured at more than one place, such representation tended to create the belief that the posts were in demand, and evidence of such representation was material in an action based upon false representations.
4. ———: ———: ———: **CONTRADICTION OF WRITTEN RECEIPT.** Where, in pursuance of a contract, certain notes were given by plaintiff to defendants, and their receipt taken therefor, in an action by plaintiff against defendants, based upon alleged false representations whereby plaintiff was induced to enter into the contract, *held* that plaintiff might prove that the defendants falsely represented that the notes were to be held as collateral security—such evidence being offered to establish the charge of false representations, and not to contradict the receipt.
5. ———: ———: **RELEVANCY OF.** Where defendants, in order to induce plaintiff to enter into a contract of agency for the sale of certain articles, agreed to furnish the articles to him at a given price, such agreement was a representation that they could be furnished at that price, and defendants' subsequent refusal to furnish them at that price tended to show that the representation was false; and evidence of such refusal was, therefore, admissible in an action against defendants based upon false representations leading to the contract.

Appeal from Marshall Circuit Court.

WEDNESDAY, DECEMBER 12.

ACTION at law to recover damages sustained by a fraud-

ulent conspiracy of the defendants, whereby plaintiff was induced to execute his negotiable promissory notes to defendants, which they transferred before maturity. There was a judgment upon a verdict for plaintiff. Defendants appeal. The facts of the case, so far as they are necessary for a full understanding of the questions decided, appear in the opinion.

Binford & Snelling, for appellant.

Brown & Carney, for appellee.

BECK, J.—I. We will consider the objections to the judgment urged by defendants' counsel in the order of their discussion in argument.

The petition declares upon fraudulent representations made by defendants, inducing plaintiff to enter into a contract for the sale of fence posts and wire for fencing. It is alleged that he was induced to enter into the contract through a conspiracy of the defendants to cheat and defraud him. The allegations of the petition are denied by defendants.

The defendants first insist that the evidence fails to support the verdict, and that there is an absence of proof of the conspiracy and fraudulent representations. The abstract before us does not purport to set out the substance of all the evidence, and it is nowhere stated therein that all the evidence is presented in the abstract. The certificate of the judge, showing that all the evidence is preserved of record, is presented at length in the abstract. But this fails to show that the abstract itself contains all the evidence. We have frequently held that such certificate is not sufficient to show that the abstract sets out all the evidence. See *Conwell v. House et al.*, 57 Iowa, 754. This objection is raised by plaintiff's counsel, and we cannot disregard it. The statement of counsel for defendants in their reply to plaintiff's argument does not mend the matter. They say upon this

1. PRACTICE
in supreme
court: ver-
dict: evi-
dence to sup-
port: defect-
ive abstract.

point that "the abstract in this case is an agreed abstract of the testimony abstracted from the transcript, which contains all the testimony, as will appear from the judge's certificate." As we have said, this certificate shows that the transcript contains all the evidence. But there is nothing to show that the abstract, upon which we try the case, contains all the evidence. We cannot, therefore, decide the point urged by defendants, that the verdict is not sufficiently supported by the evidence.

II. It is next urged that the circuit court erroneously admitted the evidence of certain witnesses for plaintiff, Shaw, Peet and Myrick, for the reason that the evidence of each was incompetent and irrelevant. The evidence of these witnesses related to statements and declarations in regard to the posts and wire, which were the subject of the contract, made by defendants not in the presence or hearing of plaintiff.

2. EVIDENCE:
admissibility
of : false rep-
resentations
made to third
parties.

It does not appear from the testimony of Shaw that the statements to which he testified were not made in the presence of plaintiff. But, indeed, it may be inferred from his testimony that plaintiff was present at the conversation to which witness refers.

By the contract between the parties, which plaintiff claims was induced by the fraud and conspiracy of the defendants, he became their agent for the sale of the posts. Before this contract was entered into, the defendants had negotiations with Peet and Myrick with a view to contracting with them for an agency of the same character as that which plaintiff finally assumed under the contract. The statements testified to by these witnesses were made during these negotiations, and consisted of representations which are of the same character as those made to plaintiff, and which he alleges were false and fraudulent. The evidence, we think, was rightly admitted. This is not unlike the case where one holds himself out as competent to render service, or exposes goods for sale with public representations of their quality. He will

be bound by those representations. The defendants were seeking parties with whom to contract. Evidence that they had made certain representations to those with whom they had negotiated, to induce them to enter into a contract, tends to support plaintiff's testimony, to the effect that like representations were made to him for that purpose. We do not understand that plaintiff relies wholly upon the testimony of these witnesses to show that the representations were made to him. He testifies that they were made to him personally. The testimony of the witnesses surely corroborates him upon this point, and was therefore competent.

III. The plaintiff was permitted to testify, against defendants' objection, that defendants represented that the posts were manufactured at more than one place. It is claimed that this representation was not true. Defendants think the evidence immaterial. We are not of that opinion. The belief that the posts were in demand tended to induce plaintiff to enter into the contract, and that belief was founded upon the representations in regard to the extent of their manufacture.

IV. The plaintiff testified that the defendants represented that certain notes were to be held as collateral security.

1. —: —: These notes were executed in lieu of advanced cash payments to be made by plaintiff under the contract, and were executed on the day of the date of that instrument. To this evidence defendants objected, on the ground that it contradicted a receipt given therefor by the defendants. The evidence has no such effect. The action is to recover on the ground of the conspiracy and fraud, whereby plaintiff was induced to enter into the contract and execute the notes. It is not the purpose of the evidence to contradict these instruments. Their validity is not disputed in this action. But plaintiff insists that, through the fraud and conspiracy of defendants, he was induced to execute them. The false representation that the notes were to be held as collateral security constitutes a part

The Council Bluffs & St. Louis Railway Company v. Bentley et al.

of the fraud of which plaintiff complains, and the evidence in question, tending to prove it, was rightly received.

V. The plaintiff testified that defendants promised to furnish him wire and posts at agreed prices, and that, after 5. — : — : the execution of the contract, plaintiff ordered relevancy of. wire of defendants, and received letters informing him that the goods would be sent upon the receipt of the cash at prices higher than was agreed upon. This evidence was objected to on the ground that it established a breach of contract simply, and not a fraud. We think this evidence competent. The failure of defendant to furnish the goods at the prices agreed upon tended to show that their representations as to their ability to furnish them were false and fraudulent. In view of the fact that these representations were made as an inducement to the contract, if false, they were fraudulent. The evidence in question tended to show that they were false.

The foregoing discussion disposes of all objections urged in argument by defendants' counsel. In our opinion the judgment of the circuit court ought to be

AFFIRMED.

62 446
116 682

THE COUNCIL BLUFFS & ST. LOUIS RAILWAY COMPANY V.
BENTLEY ET AL.

1. **Railroads: CONDEMNATION OF RIGHT OF WAY: JURISDICTION OF SHERIFF'S JURY: CERTIORARI.** A sheriff's jury has no jurisdiction in proceedings to condemn right of way for a railroad, unless the owner refuses to grant the right of way, or the parties are unable to agree upon the compensation to be paid therefor. Code, § 1244. Consequently, where the owner had conveyed the right of way to the railway company, though by a deed which he was seeking to have set aside in equity, since the deed, until set aside, vested the title *prima facie* in the railway company, the proceedings of the sheriff's jury, called out upon the owner's motion, were without authority, and were properly set aside on *certiorari*.

Appeal from Mills Circuit Court.

WEDNESDAY, DECEMBER 12.

JUDGMENT for plaintiff, and defendants appeal.

Hall & Stone and Kelley Bros., for appellant.*D. H. Solomon*, for appellee.

SEEVERS, J.—This is a *certiorari* proceeding for the purpose of testing the legality of a sheriff's jury, awarding to the defendants damages for the right of way over certain real estate owned by the principal defendants.

The jury was impaneled by the sheriff at the instance of the Bentleys. In the petition for the writ, several objections to the validity of the proceedings are alleged. Among others, it is stated that the defendants, the Bentleys, had conveyed the right of way in question to the plaintiff for a valuable consideration, prior to the commencement of the proceedings to condemn, instituted at the instance of the said defendants. This is not denied in the answer, but it is sought therein to avoid the effect of the allegation by the statement that, prior to the commencement of this proceeding, an action in equity was commenced by the principal defendants for the purpose of testing the validity of the said conveyance.

Proceedings to condemn the right of way for a railway corporation may be instituted by either the owner or the corporation, but this can only be done in case the owner refuses to grant the right of way, or the parties are unable to agree upon the compensation to be paid therefor. Code, § 1244.

In the present case, the compensation has been, not only agreed upon, but paid the owner by the plaintiff; and the former had conveyed the right of way to the corporation. This being so, the proceeding condemning the right of way by the sheriff's jury is void for want of jurisdiction over the

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subject matter. In fact, there was no subject matter in relation to which, under the statute, the sheriff had the power to act. There was no dispute to settle, and no condemnation required. The conveyance vested the title to the right of way in the plaintiff, unless it was void. This is not claimed. But, as we understand, for some reason not apparent in the record, it is claimed the conveyance is voidable. Conceding this to be so, until it was set aside in a proceeding instituted for that purpose, it at least had the effect to *prima facie* vest the legal title to the right of way in the plaintiff, and, therefore, the sheriff's jury had no jurisdiction over the subject matter at the time they were called on to act.

AFFIRMED.

CALL V. HAMILTON COUNTY.

1. **County:** POWER TO EMPLOY AGENT TO SELL SWAMP LANDS. While a county may have no power to employ an agent to sell its indemnity swamp lands, that duty being imposed by statute upon the board of supervisors, it has the power to employ an agent to find purchasers to whom the county may sell by its proper officers; and for services rendered in that capacity at the county's request the agent may recover reasonable compensation; and he cannot be defeated by the fact that the county had not the power to sell the particular land in question, if it had a general power to sell such lands.
2. **Pleading:** ALLEGATION OF AGENT'S AUTHORITY. In an action to recover for services rendered to a county, where the plaintiff alleges that he was employed by the county, through an agent, this was a sufficient allegation of employment by the county, and it was not necessary to aver the agent's authority.

Appeal from Hamilton District Court.

WEDNESDAY, DECEMBER 12.

ACTION for services in assisting the defendant in making sales of lands. The plaintiff avers, in substance, that in 1880 the defendant was the owner of certain so-called indem-

Call v. Hamilton County.

nity swamp lands; that it employed him through its agent, one Baxter, to find a purchaser for the lands; that he did find such purchaser, and negotiated a sale, which was adopted and completed by the defendant; and that his services were reasonably worth \$356.71.

The defendant demurred to the petition upon the ground, in substance, that it does not show that the sale was authorized by a vote of the people of Hamilton county, or that it was made at auction, or that the county was authorized to employ an agent to make a sale; and upon the further ground that the law does not in fact authorize the employment of agents other than county officers to sell indemnity lands. The court sustained the demurrer, and the plaintiff electing to stand upon his petition, judgment was rendered for the defendant for costs. The plaintiff appeals.

Whiting S. Clark and J. H. Call, for appellant.

W. J. Covil, for appellee.

ADAMS, J.—We think that the petition shows a cause of action and that the demurrer should have been overruled.

1. COUNTY: It may be true, as the county contends, that it has no power to employ an agent to sell its lands.
power to employ agent to sell swamp lands.

But the plaintiff was not employed for that purpose, but quite a different one, and that was to find some one who wanted to buy, and to whom the county through its officers could sell. He might have had, and doubtless did have, greater facilities for finding a purchaser than the county officers had, and was employed for that very reason. While county officers could not divest themselves of the responsibility imposed upon them by law in making the sale, they might aid themselves in matters preliminary to the sale. The statute imposes upon the board of supervisors the care and management of the county property; (Code, § 303;) and, as incident to the exercise of such power, they

may in a proper case employ an agent to aid them. *Wilheim v. Cedar County*, 50 Iowa, 254.

As to whether the board of supervisors had at the time of the plaintiff's employment the power to sell the particular land in question, we do not inquire. They may have had, and, under the averments of the petition, they must have assumed to have. It was for them to know whether they had or not. The plaintiff was supposed to know simply their general power. He was not, we think, supposed to have knowledge of specific facts upon which the exercise of their power depended.

The question is raised in argument, though not in the demurrer, as to whether the petition should not have shown that Baxter had authority to employ the plaintiff. To this we think it sufficient to say that he might have had, and the averment is that "the defendant * * * through Baxter * * * did employ the plaintiff." We do not think that it was necessary to aver more. Besides, the plaintiff avers that the sale negotiated by him was adopted and completed by the county.

REVERSED.

62 450
j132 29

KEELINE V. THE CITY OF COUNCIL BLUFFS ET AL.

1. **Jurisdiction:** OF CAUSE PRESENTED WITHOUT ACTION UPON AN AGREED STATEMENT OF FACTS. The courts of this state have no jurisdiction to entertain a cause presented without action upon an agreed statement of facts, unless it is shown by affidavit that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto. Code, § § 3408, 3409.

Appeal from Pottawattamie District Court.

WEDNESDAY, DECEMBER 12.

THIS is a case, prosecuted without action, upon an agreed

statement of facts, wherein plaintiff sought an injunction restraining defendants from opening an extension of a street. The district court dismissed the proceeding, and plaintiff appeals.

John H. Keatley, for appellant.

W. S. Mayne and *G. A. Holmes*, for appellee.

BECK, J.—I. This proceeding is wholly based upon an agreed statement of facts, signed by the attorneys of the parties, wherein the relief sought by plaintiff is prayed for. There are no pleadings in the case, nor was there any notice or other process served upon defendant. The Code contains the following provisions applicable to the question of the sufficiency of the proceedings to authorize an adjudication of the questions of law and fact arising in the case:

“Section 3408. Parties to a question in difference, which might be the subject of civil action, may, without action, present an agreed statement of the facts thereof to any court having jurisdiction of the subject matter.

“Section 3409. It must be shown by affidavit that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto.”

II. The affidavit required by the last of these sections was not made and presented to the court. This requirement is jurisdictional, and, in the absence of compliance therewith, the circuit court was not authorized to take cognizance of the case.

The object of the statute is to withhold from the consideration of the courts all cases wherein real interests of parties are not affected, and to prevent decisions being demanded where there are no conflicting rights and claims. Did not the statute so provide, decisions could be obtained by parties whose interests are one way, which would be sought without the *good faith* contest necessary to a correct decision of all questions of law and fact; and parties might obtain decis-

 Malchen v. Clay et al.

ions upon questions of law and fact from motives of mere curiosity, where no real conflicting interests exist between them. The courts in the decision of all cases ought to have the aid of discussion by parties adversely interested, and ought not to be required to determine questions where no conflicting interests are involved. The consideration that decisions of the courts establish rules of the law applicable to the rights and property of all citizens supports this conclusion.

As the record before us fails to show that the district court had jurisdiction of the case, its judgment dismissing the proceeding is

AFFIRMED.

MAICHEN V. CLAY ET AL.

1. **Contract: PURCHASE OF LAND THROUGH AGENT: EXCESS OF AUTHORITY: LIABILITY OF AGENT.** Where the owner of land had leased the same to a tenant in possession for a term not yet expired, and had authorized his agent to sell the same subject to the lease, and the agent, knowing of the lease, represented to the plaintiff that he had authority to sell and give immediate possession of the land, and so negotiated a sale to plaintiff, taking \$200 from him as a cash payment, *held* that plaintiff, after learning of the lease, was not bound to accept from the agent a warranty deed from the owner, but that he might reject the deed, and recover from the agent the \$200 paid him in the transaction.
2. **Pleading: REDUNDANT ALLEGATIONS: PROOF.** A plaintiff is never required to prove more of the allegations of his petition than is required to enable him to recover, and where allegations which might have been material become redundant as the case progresses, they need not be proved.

Appeal from Woodbury District Court.

WEDNESDAY, DECEMBER 12.

THIS is an action to recover of defendants the sum of \$200, which, it is alleged, they received from the plaintiff as

62	452
88	248
62	452
121	276
62	452
127	220
127	221
127	563

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part of the purchase money of certain real estate, which they contracted as agents of one Walker to sell and convey to the plaintiff, and which contract of sale was never consummated, because defendants did not and could not give the plaintiff possession of the land.

There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendants appeal.

Struble, Rishel & Sartori, for appellants.

R. W. Stewart, for appellee.

ROTHOCK, J.—The following is a copy of part of the petition: “The plaintiff states that L. D. Clay and E. C.

1. CONTRACT: Clay are indebted to him in the sum of two hundred dollars, for that the said defendants, on purchase of land through agent: excess of authority: liability of agent: or about the 8th day of April, 1882, in the city of Le Mars, in Plymouth county, Iowa, wrongfully and wickedly represented to plaintiff that they, the defendants, in the capacity of agents, had and possessed authority of one E. P. Walker, the owner of the following land in Plymouth county, Iowa, viz: the northwest quarter of section ten, township ninety-two, range forty-four, west, to sell, or contract to sell, said land unto plaintiff, at the stipulated price of two thousand six hundred and fifty dollars; possession, use and benefit of said premises to be given purchaser upon acceptance or delivery of deed, and title thereof to be good and sufficient.”

It is further averred in the petition, in substance, that the plaintiff relied upon the representations so made, and contracted with defendants for the purchase of said land, and paid them two hundred dollars, and agreed to pay eighteen hundred dollars upon the delivery of a conveyance to him, and six hundred dollars one year thereafter, and that possession of the land should be given plaintiff upon a delivery of the deed, and the title was to be good and sufficient and clear of all liens and defects. “That said defendants had no

authority to bargain or contract for the sale of said land, as represented by them aforesaid, and that said defendants and the said E. P. Walker have failed and refused to furnish the plaintiff with a good and sufficient title to said land, free and clear of all liens or defects, and refuse or fail to give a good and sufficient deed, with the use and possession of said premises."

Judgment was demanded for two hundred dollars and interest, and an attachment was issued upon the ground "that the debt is due for property obtained under false pretenses by the said defendants from this plaintiff".

The defendants by their answer admit the payment of \$200 to them by plaintiff, and aver that they had authority to sell the land, and that plaintiff refused to comply with his contract by accepting a good and sufficient deed for the land, and that they refuse to pay back the \$200, because of plaintiff's failure to perform his contract, and because of an agreement that, in case of plaintiff's failure to perform, he should forfeit the two hundred dollars.

There was also a cross-action to recover damages of the plaintiff for wrongfully and maliciously suing out the writ of attachment.

It appears that Walker was the owner of the land, and that it was leased until the month of October, 1882, to a tenant who was in possession. Walker authorized the defendants to sell the land for \$2,560 net to him, the purchaser to pay the taxes of 1881, and Walker to have his landlord's interest in the crops of 1882. Walker resided in Cedar Falls, and, when the contract was made, a deed was sent to him to be executed and returned. He executed the deed and sent it to a bank at Le Mars. The deed was an ordinary conveyance with covenants of warranty. The plaintiff refused to accept the deed because of the lease of the land. The deed was afterwards returned to Walker, and he has since sold the land to other parties.

The material question in the case is, whether the plaintiff

was bound by his contract to take the deed and complete the purchase. The defendants claim that he was so bound, because by his contract he agreed to pay the taxes for 1881, and allow Walker to have the rents for the year 1882. The plaintiff claims that he was to have a conveyance clear of incumbrance, and was to pay no more than the sum of \$2,650 in all. On this question there is a conflict in the evidence. The jury have found that the testimony of the plaintiff is true, and we are bound by the finding. We are also required to hold that the jury was warranted in finding that the defendants represented to the plaintiff, when they received his money, that they had full authority to sell the land and put him in possession of it. They concede that they had no such authority, for neither they nor their principal, Walker, had any right to interfere with the tenant in possession, until the expiration of his lease.

Much has been said in argument by counsel for appellants as to the nature of the action. It is claimed that, because it is stated in the petition that the defendants "wrongfully and wickedly" made representations to the plaintiff which were not true, the action is in tort; that it is to recover for false representations; and that there can be no recovery without proving the tort. And complaint is made because the court in its instructions did not place the plaintiff's right to recover upon that ground.

This was wholly immaterial. A party plaintiff is never required to prove more of the allegations of his petition than is necessary to entitle him to recover. The willfulness and wickedness of the representations were only material in this case when the jury came to consider the claim of defendants for damages for the alleged wrongful suing of the writ of attachment. The court gave the jury the proper instructions upon this branch of the case.

When the jury found, as they must have done to reach the conclusion which they did, that the defendants represented that they had full authority to sell the land, and put the

2. PLEADING:
redundant al-
legations:
proof.

State v. Rodman.

plaintiff in possession thereof, and that the defendants knew they had no such authority, and knew that the extent of their agency was to sell the land encumbered with the lease, that was practically an end of all questions in the case. The verdict necessarily included the finding that the defendants knew they did not have the authority they claimed to have and that, therefore, the writ of attachment was not wrongfully issued.

Something is claimed in argument as to Walker's being the proper party defendant in an action upon the contract. A ready answer to this is that, as the jury has found that the defendants made a contract which did not bind Walker, and received thereon the sum of \$200 which they still retain, they are surely the proper parties to repay the same to the plaintiff.

Some complaint is made of rulings upon the admission of evidence. We do not think the objections well taken. We have not followed the argument of appellants nor alluded to the assignment of errors in detail, but we think the foregoing discussion disposes of all material questions in the case.

AFFIRMED.

STATE V. RODMAN.

1. **Criminal Evidence: COMPETENCY OF WITNESS NOT BEFORE GRAND JURY.** Section 5, chapter 130, Acts of Eighteenth General Assembly, provides that an indictment may be found by the grand jury upon the minutes of the testimony duly taken, reduced to writing, and returned to the court by the committing magistrate; and this enactment so far supersedes section 4421 of the Code as to render a witness, whose testimony has been properly taken and returned by the magistrate, and whose name has been placed upon the indictment, competent to testify upon the trial, without having testified before the grand jury.
2. ———: **FAILURE OF DEFENDANT TO PRODUCE TESTIMONY: PRESUMPTION.** Where a defendant in a criminal case fails to produce testimony which is within his power, but not accessible to the state, to explain facts estab-

62	456
83	598
62	456
92	486
68	456
94	40
62	456
105	44
62	456
123	123
62	456
126	502
62	456
133	39

lished by the state against him, the jury is warranted in inferring that such testimony, if produced, would be against him; but this does not mean that the failure of the defendant to testify in his own behalf is to be taken as proof of his guilt.

3. —: ATTEMPT TO ESCAPE: CONTRADICTIONARY STATEMENTS. Where defendant was charged with larceny, the facts that he had attempted to escape, and that he had made contradictory statements as to how he had come into possession of the property, tended, if proved, to show his guilt; and the jury was properly instructed to that effect.
4. —: GOOD CHARACTER. Evidence of good character avails for the defendant, whether the evidence of his guilt be direct or circumstantial; and an instruction, though asked by defendant, that such evidence avails only as against circumstantial evidence, was properly refused.
5. —: LARCENY: PRIMA FACIE CASE SUPPORTS VERDICT. In a larceny case, a verdict of guilty will not be set aside on the ground that the fact of the larceny was not sufficiently proved, when the evidence made at least a *prima facie* case of larceny.

Appeal from Poweshiek District Court.

WEDNESDAY, DECEMBER 12.

DEFENDANT was convicted of the larceny of a horse, and sentenced to the penitentiary for three years. He now appeals to this court.

Redman, Carr & Farmer and Stivers & Louthan, for appellant.

Smith McPherson, Attorney-general, for the State.

BECK, J.—I. The indictment in the case was found upon the evidence contained in the minutes of the testimony taken by a magistrate, by whom the defendant was committed for the offense for which he was indicted. Upon the trial, the defendant objected to the testimony of a witness whose name was indorsed upon the indictment, upon the ground that he had not testified before the grand jury. The objection was overruled and this action of the district court constitutes the first ground of objection urged upon our attention.

1. CRIMINAL
evidence:
competency
of witness not
before grand
jury.

Code, § 4421, provides that in a criminal case the state cannot introduce a witness against defendant who was not examined before the grand jury, and the minutes of whose evidence there given was not presented with the indictment. Section 5, Chapter 130, Acts Eighteenth General Assembly, (Miller's Code § 4289,) provides that an indictment may be found by the grand jury upon the minutes of the testimony taken, reduced to writing and returned to the district court, as required by Code, §§ 4241, 4242, 4253, and witnesses need not be personally examined before the grand jury. This enactment supersedes Code, § 4421, so far as it requires a witness, whose testimony has been reduced to writing and returned by the committing magistrate, to be personally examined before the grand jury. The written examination takes the place of the oral testimony. So far Code, § 4421, is modified by the subsequent statute.

II. Counsel of defendant complain of an instruction, on the ground that it holds that the failure of defendant to testify in his own behalf should be taken as proof of his guilt. No instruction to this effect was given. The objection under consideration is based upon a misconception of the familiar rule, presented in an instruction, to the effect that, if defendant failed to introduce proof which he ought to have done, explaining facts or circumstances established by the evidence which operated against him, it is a circumstance to be considered in reaching a conclusion as to his guilt, and that, if evidence within the power of the defendant, and not accessible to the state, is withheld by the defendant, the jury are authorized to infer that, if produced, it would be against defendant. This instruction could not have been understood by the jury to apply to his failure to testify in his own behalf.

III. The court instructed the jury that an attempt by defendant to escape while held in custody for the offense, if found from the evidence, should be considered as tending to establish guilt, and that contradictory statements as to the manner of the acquisition of

2. — : failure of defendant to produce testimony: presumption.

3. — : attempt to escape: contradictory statements.

State v. Rodman.

the possession of the property, if proved, should have the same effect. Counsel insist that these instructions authorize the jury to consider the facts contemplated therein as evidence of the larceny—that the property was stolen. They could not have been so understood by the jury. Indeed, the one fact referred to explicitly directs the jury that they must first find that a larceny had been committed, before considering the evidence relating to the attempted escape.

IV. The defendant introduced evidence tending to show that he sustained a good character. He asked an instruction applicable to this testimony, to the effect that
 4. ———: good character. proof of good character avails only when circumstances are relied upon to establish guilt, and that, if they are “in doubt,” a presumption is raised that defendant would not have committed the crime. The instruction was properly refused. It is really unfavorable to defendant. Good character avails, whether the evidence be direct or circumstantial. *State v. Kinley*, 43 Iowa, 294. And, if the circumstances relied upon are “in doubt,” a reasonable doubt of defendant’s guilt existing, the jury should acquit without evidence of defendant’s good character.

The district court by a correct instruction directed the jury to consider the evidence of good character, and to give to it such weight as they thought it entitled to receive.

V. It is insisted that the evidence fails to support the verdict, in that it is not shown that the horse in question was stolen. The evidence shows that the horse was
 5. ———: prima facie case supports verdict. put in a stable at night and next morning was gone. Counsel insist that, as the evidence fails to show that the animal was secured in the stable, it might have escaped. The evidence, as counsel argue, fails in not showing that the horse was in some manner “fastened in the stable.” The evidence shows *prima facie*, at least, that the animal was stolen. If it was not “fastened in the stable,” defendant could readily have shown it. But he elicited no evidence upon the point. We think upon all the evidence that

Cruver v. The Chicago, Milwaukee & St. Paul R'y Co.

the verdict of the jury is sufficiently supported. We have considered all questions raised in this case. The judgment of the district court must be

AFFIRMED.

69	460
82	274

CRUVER V. THE CHICAGO, MILWAUKEE & ST. PAUL R'Y CO

1. **Pleading: CAUSE OF ACTION NOT STATED IN ONE COUNT: OBJECTION WAIVED.** When a petition contains more than one cause of action, each must be stated in a count or division by itself, and must be sufficient in itself; (Code, § 2646;) but when this rule is violated, the defendant must make his objection in the court below, and, if he fails to do so and goes to trial, he thereby waives the objection.
2. **Practice in Supreme Court: ABSTRACT FILED TOO LATE: COSTS.** Where an amended abstract is filed too late under the rules, it will not be stricken from the files, but no costs on account thereof will be taxed against the other party.

Appeal from Floyd Circuit Court.

WEDNESDAY, DECEMBER 12.

THIS is an action to recover damages for stock killed by defendant at a point where it had the right, but had failed, to fence. The petition contains five counts. The first count alleges that, on the twenty-sixth day of February, 1881, the defendant ran its train over, and killed, a three-year-old heifer, the property of the plaintiff, of the value of \$25. The second count alleges that, on the twenty-seventh of June, 1881, the defendant ran its train of cars over a three-year-old colt, the property of the plaintiff, and injured it to the extent of \$60. The third count claims the sum of \$10 for caring for, doctoring and furnishing medicines for the colt referred to in the second count. The fourth count alleges that, on the fifteenth day of June, 1881, the defendant ran over and killed two heifers and three steers, the property of plaintiff, of the aggregate value of \$106, and injured one steer to the

Cruver v. The Chicago, Milwaukee & St. Paul R'y Co.

extent of \$5. This count alleges that the amount of all the injury and damage was the sum of \$206. The fifth count alleges that, on the thirtieth day of August, 1881, the plaintiff caused to be served upon the defendant a notice and affidavit in writing of the amount of said injury, and that defendant had failed to pay the same within thirty days; wherefore plaintiff is entitled to double damages. Judgment is asked for \$402. The defendant, for answer, alleges that the heifer referred to in the first count was not at the time of the killing running at large. For answer to all the rest of the plaintiff's claim, the defendant alleges that it was settled on the twenty-third of September, 1881, for the agreed sum of \$141, which was offered and tendered to plaintiff, and which defendant has ever since been ready and willing to pay.

There was a jury trial, and a verdict for plaintiff for \$426.12. The jury also found specially that there was due the plaintiff upon the first count the sum of \$52. The defendant moved the court for a new trial. The court sustained the motion as to the second, third and fourth counts, and overruled it as to the first count, and entered judgment for plaintiff, upon the special finding, for \$52 and costs. The defendant appeals.

George E. Clark and Ellis & Ellis, for appellant.

Boulton & Boulton, for appellee.

DAY, CH. J.—The defendant asked the court to instruct the jury as follows: "Under the allegations of count 1st of plaintiff's petition, the plaintiff could not recover double the value of the heifer referred to in the first count of plaintiff's petition, even though you should find that she was running at large at the time of the injury." The court refused to give this instruction. The defendant now insists that there can be no recovery of double damages upon the first count, because it does not allege the service of the affidavit and notice in writing, which is essential to a recovery of double

damages. Section 2646 of the Code, subdivision 5, provides "When the petition contains more than one cause of action, each must be stated wholly in a count or division by itself, and must be sufficient in itself; but one prayer for judgment may include a sum based on all counts looking to a money remedy." It must be conceded that the first count of the petition does not contain the averments necessary for the recovery of double damages. See *The National Bank of Michigan v. Green*, 33 Iowa, 140. And yet other parts of the petition do contain the averments necessary to a recovery of double damages for the whole injury sustained, and it is clearly apparent from the whole petition that the plaintiff was seeking double damages for all the injury sustained. The case is not one where the petition does not state facts sufficient to constitute a cause of action, but where the facts are not stated in the formal manner which the Code and the rules of pleading require. The defect was apparent upon the face of the pleading. An objection apparent upon the face of of a pleading, which might have been raised by demurrer, will be waived by going to trial on the merits, and cannot be raised for the first time in an instruction. *Young v. Broadbent*, 23 Iowa, 539. Even an objection that the facts stated in the petition do not entitle the plaintiff to any relief whatever must be taken advantage of by motion in arrest of judgment, before judgment is entered. Code, § 2650. Although the motion for a new trial presents thirty-three grounds, no one of them refers to any defect in the petition. We are clearly of opinion that the objection now insisted upon has been waived.

II. The defendant complains of certain instructions given upon the question of tender. As the court granted a new trial upon all the counts in which the tender was pleaded, the present appeal does not involve the correctness of these instructions.

III. The appellant submitted with the case a motion to strike from the files appellee's amended abstract. The

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amended abstract was not filed until long after the time prescribed in the rules of this court. We will not for that reason strike it from the files, but no costs will be taxed to the appellant therefor.

AFFIRMED.

KAISER ET AL. V. SEATON, SHERIFF, ET AL.

1. **Execution: EXEMPTION OF DAMAGES FOR RIGHT OF WAY OVER HOMESTEAD.** Money due from a railroad company, or from the sheriff, after it has been paid to him by the company, as damages assessed by a sheriff's jury for right of way over a homestead, is exempt from execution, notwithstanding the character of the homestead as such is not destroyed by the easement.

Appeal from Linn Circuit Court.

WEDNESDAY, DECEMBER 12.

ACTION for an injunction to restrain the defendant, Seaton, as sheriff, from applying certain money on an execution in his hands. There was a decree for the plaintiffs. The defendants appeal.

Stoneman, Rickel & Eastman, for appellants.

Mitchell & Smith, for appellees.

ADAMS, J.—The money belongs to the plaintiff, Kaiser, and the execution is against him. It would be proper for the sheriff to apply the money, unless it is exempt.

The facts appear to be that the plaintiff, Kaiser, is the head of a family, and, as such, owns and occupies certain premises in the city of Marion as a homestead. In 1881, the Chicago, Milwaukee & St. Paul R. Co. condemned a right of way through the land, and paid to the defendant, Seaton, as sheriff, the amount of money awarded as damages. About the

62	468
88	348
63	463
89	327
62	463
J104	539
62	463
117	390
62	463
121	349
4121	350

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same time certain judgment creditors of Kaiser caused an execution to be issued against him, and placed the same in Seaton's hands, and demanded that he should apply thereon the money paid him by the railroad company as damages for right of way. The plaintiffs, apprehending that Seaton would make such application, brought this action for an injunction to restrain him. The judgment creditors are made parties defendant.

It is not denied by the defendants that the homestead in question is exempt. They merely deny that the money paid as damages is exempt. They rely upon *Chicago & Southwestern R. Co. v. Swinney*, 38 Iowa, 182, and *Harkness v. Burton*, 39 Iowa, 101.

In the former case, the court held that the husband could convey a right of way over the homestead without the concurrence of the wife. It appeared in that case that the homestead character of the premises was not substantially affected. Such being the fact, it was thought that the conveyance of a right of way through it was not a conveyance of the homestead in such sense as to render necessary the wife's concurrence. In the case at bar, while the homestead consisted of only one and one-half acres, and the value was considerably impaired by taking one hundred feet for right of way, yet the buildings were not disturbed, and the premises were not deprived of their character as a homestead. We are not prepared to say, therefore, that the case can be distinguished from the *C. & S. W. R. Co. v. Swinney*, so far as the mere question as to the effect of taking the right of way is concerned.

But we do not think it follows that, because the wife's concurrence in a voluntary grant of a right of way is not necessary, the money due or paid for damages sustained is not exempt where a right of way is taken compulsorily. Whether the proceeds of a voluntary conveyance by the husband would be exempt, we need not determine. Where the right of way is taken compulsorily, the damages sustained

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are not essentially different, so far as the question before us is concerned, from those caused by a tort. The general rule, we think, is, that, where exempt property is invaded, and is converted in whole or in part into a money claim, against the will of the owner, the money collected thereon is exempt, at least for a reasonable time. The theory is that the owner is entitled to the money to repair or replace the exempt property, and that he should have a reasonable time to so use the money, if he sees fit. In Thompson on Homesteads, the author says: "A clear distinction exists between the proceeds of property exempt from attachment, when such property has been sold by the debtor, and when it has been sold by proceedings against his will, and changed into money. Where such property is converted into a mere right of action by a proceeding wholly *in invitum*, such right of action and the money collected are also exempt from attachment, the same as the property itself," citing *Stebbins v. Peeler*, 29 Vt., 289; *Keyes v. Rines*, 37 Vt., 260; *Mitchell v. Milhoan*, 11 Kan., 617; *Houghton v. Lee*, 50 Cal., 101; and *Cooney v. Cooney*, 65 Barber, 524. Substantially the same rule is held in *Tillotson v. Walcott*, 48 N. Y., 188.

The defendants, however, insist that, inasmuch as a homestead is left to the plaintiffs, the right of way damages are not to be treated as proceeds resulting from a partial conversion or destruction of the homestead, but rather as income, and falling under the principle of *Harkness v. Burton*, above cited. In support of this view it is urged that the easement is not necessarily permanent, and that, if it should be abandoned by the railroad company, the most that could be said is that the plaintiffs suffered a temporary inconvenience.

While it is true that the right of way may be abandoned, it was manifestly not taken with that view. Practically, we think that we should regard the homestead as having sustained a permanent impairment, and, indeed, partial destruction. Without question, the property is less valuable for a homestead; and the plaintiffs may need the money in ques-

Wearin et al. v. Munson.

tion to offset the impairment by the acquisition and addition of other ground, or to aid them in the purchase of a different homestead. Exemption laws are to be maintained in their spirit as well as letter, and even liberally construed in favor of those claiming their benefit. *Bevan v. Hayden*, 13 Iowa, 125.

We see no error in the ruling of the circuit court, and the judgment must be

AFFIRMED.

62	466
83	306
62	466
88	250
62	466
141	213

WEARIN ET AL. V. MUNSON.

1. **Injunction to Restrain Waste:** EVIDENCE OF TITLE AND POSSESSION. An injunction asked by plaintiffs to restrain defendant from cutting timber from certain land was properly refused, where plaintiffs failed to show that the title of the land was in them, or that they were in possession thereof.

Appeal from Mills District Court.

WEDNESDAY, DECEMBER 12.

THE petition states: *First*, That plaintiffs are the widow and heirs at law of Josiah Wearin, deceased; *Second*, That plaintiffs, as such widow and heirs at law, are the owners of certain real estate, described in the petition; *Third*, That defendant makes some claim to said real estate adverse to the plaintiffs; and, *Fourth*, That said real estate has been actually and notoriously in possession of their ancestor and themselves for the last twenty years, under a claim of ownership, and that defendant has cut down and converted to his own use valuable timber growing on said real estate, and threatens to continue doing so, and that he is insolvent. The relief asked is that the case be heard in equity, and that a temporary injunction be issued restraining the defendant

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from committing waste; that the claims of the respective parties be determined; and for general relief.

The defendant answered the petition, and denied each allegation therein, except the first and third propositions above stated, which were admitted. There was a trial to the court, the petition was dismissed, and plaintiff appeals.

Watkins & Williams, for appellants.

John Y. Stone, for appellee.

SEEVERS, J.—I. It will be conceded that the plaintiffs are entitled to the relief asked in the petition, if they on the trial established the allegations thereof. It is admitted that the plaintiffs are the widow and heirs at law of Josiah Wearin.

There was introduced in evidence a deed from Mills county, conveying the real estate to Josiah Wearin in June, 1870, in pursuance of a pre-emption made in 1855, but there is no evidence that Mills county was the owner or had any title to the real estate in controversy. This being so, the evidence fails to show that Josiah Wearin at his death had title. In the absence of evidence, it cannot be presumed that the land in question was swamp land; nor can it be presumed that, if it was such, the title thereto was vested in said county.

II. There is no evidence tending to show that Josiah Wearin or the plaintiffs were in actual possession of the real estate. But counsel claim that it should be presumed that they were, because of the conveyance from Mills county.

We have no occasion to determine what the rule would be, if such conveyance vested the legal title in the ancestor of the plaintiffs. But, as has been seen, it does not have such effect, and, therefore, to recover, it was incumbent on the plaintiffs at least to show such actual possession as is alleged in the petition.

AFFIRMED.

KELLER ET AL. V. BARE ET AL.

1. **Township Clerk: CUSTODIAN OF ROAD FUNDS: ACTION ON SUPERVISOR'S BOND.** The township clerk, and not the trustees, is the legal custodian of the funds of a road district, so far as road supervisors are required to account therefor; and the trustees cannot maintain an action upon the bond of a road supervisor on account of his failure to account for such funds.
2. **Practice: DEMURRER WHILE ANSWER ON FILE.** Where an amended petition was filed, whereby the cause of action was radically changed, there was no error in allowing a demurrer thereto without a withdrawal of the answer to the original petition.
3. **Costs: UPON ALLOWING AMENDMENT: NO PREJUDICE.** The taxing of accrued costs to plaintiff upon allowing an amendment to his petition could not have prejudiced him, where he failed upon the trial, and thus became liable for all the costs.

Appeal from Cedar District Court.

WEDNESDAY, DECEMBER 12.

THIS is an action brought by the plaintiffs, who are trustees of Greenfield township, Jones county, to recover upon an official bond of the defendant, Bare, given by him as road supervisor of a road district in said township. It is alleged that there has been a breach of the bond, because said Bare has failed to account for and pay over certain public money which came into his hands as such officer.

The defendants filed an answer to the petition. Afterwards the petition was amended. The defendants demurred to the amendment to the petition, and to the cause of action as set forth in said amendment and original petition. The demurrer was sustained, and the plaintiffs elected to stand on their petition, and judgment was rendered against them for costs. Plaintiffs appeal.

J. W. Jamison, for appellants.

Remley & Ercanbrack, for appellees.

ROTHROCK, J.—The main question in the case, and, indeed,

that which we think is decisive of it, is—were the township trustees the proper parties to institute and maintain an action upon the bond? The bond runs to the county of Jones, and it is conditioned that said “Bare will render a true account of his office, and of his doings therein, to the proper authority, when required thereby or by law; that he will properly pay over to the person or officer entitled thereto all money which may come into his hands by virtue of his office; that he will promptly account for all balances of money remaining in his hands at the termination of his office.”

Under the provisions of chapter 2, title 7, of the Code, the township trustees have no authority to collect road taxes or to receive the same when collected. The township clerk is made the custodian of the road funds so far as the road supervisors are required to account therefor. If the supervisor fails or neglects to pay over taxes to the clerk, it would seem that, as the clerk is the officer designated by law to receive and hold the funds, he is the proper party to maintain an action upon the bond of a supervisor for failure to pay over or account for money coming into his hands. It is true, the supervisor is required to make settlement with the township trustees. Code, § 996. But the trustees have no authority to receive the taxes, and, indeed, the same section of the statute contemplates that, at the time of such settlement, the funds are in the hands of the township clerk, because, by other provisions of the statute, the supervisors are required to pay over the funds to the clerk.

II. Complaint is made because the defendants were allowed to interpose a demurrer to the petition as amended, without withdrawing the answer to the original petition. In regard to this, we deem it sufficient to say that by the amendment the cause of action was so materially and radically changed that the answer was not at all applicable thereto, and it was wholly immaterial whether it was withdrawn or not.

III. The defendants objected to the amendment, and in-

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sisted that it should not be allowed. The court permitted the amendment to be made, but taxed the costs of the term, up to the time the amendment was filed, to the plaintiffs. It is claimed that this was an abuse of the discretion of the court. In view of the fact that the demurrer was subsequently sustained, and the cause dismissed at plaintiff's costs, the taxing of the costs on the amendment becomes an immaterial question.

AFFIRMED.

BYINGTON V. MOORE.

1. **Depositions: DISCREPANCY IN NAME OF NOTARY: PRESUMPTION.** The practice of using merely the initial letters of Christain names in the execution of official papers creates liability to mistake and uncertainty, and is not to be commended. And, where a commission to take depositions was issued to Fred R., and was returned executed and certified to by F. A. R., *held* that, while the court could not, without more, presume that Fred R., and F. A. R., were indential, yet, as the commission must be presumed to have been sent to Fred R., and as it was executed, returned and certified by some one who might have been Fred R., and who stated in the body of his certificate that his name was Fred A. R., the identity of the commission sufficiently appeared, and the court properly refused to suppress the deposition on account of the discrepancy.
2. —: **WRONG SEAL TO COMMISSION: AMENDMENT: PRACTICE.** Where, after a deposition had been taken and returned in a case pending in the circuit court, it was found that by mistake the seal of the district court had been affixed to the commission, and a motion to suppress was made on that account, *held* that, as the moving party could not have been prejudiced by the ruling, it was not reversible error for the court, in sustaining the motion, to order the clerk to attach the proper seal to the commission, and to return it, thus amended, together with the deposition, to the commissioner, with directions to him to require the witness to reappear before him, and, upon his reappearance, to read over to him the deposition, and to require him to subscribe and swear to the same again, and to certify the same back to the court.
3. —: **MOTION TO SUPPRESS: TIME OF MAKING.** When a deposition is filed in term time, a motion to suppress, if made, must be made by the morning of the third day after the deposition is filed, and, in any case, must be made before the cause is reached for trial.

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4. ———: **FILING NOT ENTERED IN APPEARANCE DOCKET: OBJECTION TOO LATE ON APPEAL.** Where the filing of a deposition was not entered in the appearance docket, but the deposition was read on the trial without objection on that account, and is certified to this court on appeal, it cannot be discarded here as being no part of the record.
5. **Evidence of Letters: SECONDARY: ERROR CURED.** Error in admitting secondary evidence of the contents of letters is cured by the subsequent introduction of the letters themselves.
6. **Attorney and Client: ATTORNEY GUILTY OF FRAUD CHARGED AS TRUSTEE.** Where the holder of the equitable title to lands employs an attorney to procure for him the legal title, and the attorney, by fraudulently representing that he is the equitable owner, procures the legal title to be conveyed to himself, the employer still remains the equitable owner, and the law by implication charges the attorney as trustee of the legal title for his employer.
7. **Conveyance: DELIVERY: FACTS CONSTITUING.** Where a father conveyed to his infant son an equitable interest in certain lands, and, as guardian for his son, delivered the conveyance to an attorney whom he as such guardian had employed for the purpose of procuring for the son the legal title to the lands, *held* that this constituted a delivery of the conveyance to the son.
8. **Attorney and Client: FIDELITY REQUIRED.** An attorney who takes to himself the legal title to lands which belong in equity to his client, cannot avoid his responsibility as trustee for his client, on the ground that the client came to his interest in the lands through a conveyance made in fraud of the creditors of the grantor.
9. ———: **INFIDELITY NOT REWARDED.** Where an attorney, unfaithful to his client, takes to himself the legal title to lands which in equity belong to his client, himself paying the balance due on the lands, and afterwards sells the lands at a profit, he cannot be allowed to share the profit, but must account therefor to his client.
10. ———: **FRAUD OF ATTORNEY: ACCOUNTING: EVIDENCE CONSIDERED.** This being an accounting between a client and his attorney, growing out of the conversion to his own use by the attorney of the client's property, it is *held*, upon consideration of the evidence, that the allowances made by the trial court could not properly be disturbed on appeal.
11. **Evidence: OFFERED AFTER SUBMISSION OF CAUSE: PRACTICE.** Where a cause was submitted as a finality upon all points but one, which was reserved for further evidence, and a decree was entered accordingly, *held* that, upon the further hearing, evidence upon a point already submitted was properly excluded.

Appeal from Page Circuit Court.

WEDNESDAY, DECEMBER 12.

Action in equity for an accounting and other relief. The

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court decreed that there was due the plaintiff from the defendant a certain sum, and entered a decree therefor, and also that the defendant should convey to the plaintiff certain land in Page county. Both parties appeal, the defendant perfecting his appeal first.

McPherrin Bros., for appellant

W. W. Moreman, for appellee.

ADAMS, J.—In April, 1856, one LeGrand Byington entered into a contract with Page county, whereby he purchased from the county certain land claimed by the county to be swamp land. He paid a part of the purchase money, and took a written contract from the county, obligating it to convey the land to him upon its obtaining a perfect title, and upon his paying the balance of the purchase money. The plaintiff claims that afterward he became the equitable owner of the land by virtue of an assignment to him of the contract. LeGrand Byington is the plaintiff's father; and it appears that in May, 1861, and when the plaintiff was about seventeen months old, his father indorsed upon the contract an assignment in these words: "For the consideration of the natural affection which I have for my son, Ottoe A. Byington, and of one hundred dollars paid to me by him, I assign to said Ottoe A. Byington all my interest in this contract. Witness my hand this first day of May, 1861." This was duly signed. Whether there was any such delivery of the contract and assignment as to put the assignment in force, is one of the questions in dispute. Some time prior to 1868, certain difficulties arose in relation to the title to the land, and it became uncertain as to whether a title could be obtained from the county as had been provided in the contract. In view of these difficulties, it had become necessary for the plaintiff, or his father, to employ counsel in Page county. The defendant, as a member of the firm of Moore & McIntyre, was at that time practicing law in that county. On the 30th day of

May, 1868, the plaintiff's father, it appears, wrote to Moore & McIntyre with the view of employing them, and, as we infer, in the matter of procuring a title to this land. The letter was answered by Moore & McIntyre on the 6th day of June following. Their answer is in these words: "Dear Sir: Yours of May 30 is at hand. Our Mr. Moore will call on you about the eleventh or twelfth of this month, and talk over your land matters in this county." Moore called as promised. As to what transpired at the interview the parties differ radically. The plaintiff claims that he at that time, through his father as his guardian, employed the defendant as his attorney to procure a title to the land. The defendant denies this, and denies that he had any knowledge of the plaintiff, and denies that he undertook to act as attorney for him or his father, but says that he purchased in good faith from the plaintiff's father all the equitable interest which he derived from the county under the contract, and in ignorance of any assignment thereof to anyone. Whatever the fact may be in this respect, the defendant applied to the county for a title to the lands, representing that he had become the owner of the contract, and induced the county to convey to him; he in the meantime paying the balance of the purchase money. He afterwards sold a portion of the land and received the proceeds. The plaintiff claims that the defendant obtained the title by false representations made to the county, and in fraud of his rights.

Before proceeding to the determination of the principal question involved, we find it necessary to determine some questions of practice which are presented by the defendant's appeal. The defendant filed a motion to suppress the deposition of LeGrand Byington, taken on behalf of the plaintiff. The grounds of the motion are stated as follows:

"1. The commission to take said deposition was directed by this court to one Fred Remley, a notary public, etc., and the deposition was taken before and by one T. A. Remley, or one F. A. Remley.

"2. The paper purporting to be a commission, and to have

been issued by the clerk of this court, under and by virtue of which said deposition was taken, was not authenticated by the seal of this court, but is pretended to be authenticated by the seal of the district court of Page county, Iowa."

The motion was sustained as to the second ground, and overruled as to the other. But, as to the second ground, the court ordered that the clerk amend the commission by affixing thereto the seal of the circuit court, that being the court from which the commission issued and in which the case was pending, and ordered that the deposition and amended commission be returned to the notary public who took the deposition, with leave and direction to said officer to require the witness to reappear before him, and, upon his reappearance, to read over to him the deposition, and to require him to subscribe and swear to the same again, and to certify the same back to the court. The commission was accordingly amended by the addition of the proper seal, and returned with the deposition to the notary public, who complied with the direction of the court as above set out. In his second certificate, he added that his name is Fred A. Remley. He signed his name to the certificate as F. A. Remley, and did not append thereto any words showing the official character in which he acted. The defendant moved again to suppress for want of these words. The court sustained the motion, but directed that the deposition and certificate be returned for an amendment to the certificate by appending to the name of the officer the words "notary public within and for the county of Johnson, in the state of Iowa"; that being the county for which Remley had been appointed notary public. The deposition and certificate were accordingly returned to him, and the amendment made as directed.

I. The defendant insists that, as the commission was issued to Fred Remley, and the certificate was signed F. A. Remley,

1. DEPOSITIONS: discrepancy in name of notary: presumption.

it does not appear with proper certainty that the deposition was taken before the person to whom the commission was issued. The theory of the law is, that the clerk of the court from which the

commission was issued knew Fred Remley, or knew of him, and, having confidence in him, issued the commission for the purpose of clothing him specifically with power to do the things named therein. The person executing the commission and making a return of his doings should appear to be the person commissioned, and should so appear of record from a certificate appended to and returned with the commission.

Whether a court could presume that Fred Remley and F. A. Remley are the same person, is a question which admits, perhaps, of some doubt. The letter F. may be presumed to be the initial letter of a Christain name. Looking at it alone, as used in a given place, we could not say that it is the initial of Fred in such place. The most that we could say is that it might be. But the fact that it might be, taken in connection with two other facts, justifies us, we think, in presuming that the deposition was taken before Fred Remley. We may presume that the commission was sent to Fred Remley. It has been returned by some one, and a certificate signed with a name that might be that of Fred Remley states expressly that it is that of Fred Remley. The practice of using merely the initial letter of Christian names in executing official papers is not to be commended. It is liable at all times to lead to uncertainty and embarrassment. But in the case at bar, taking the certificate as a whole, we think that the identity of the name of Fred Remley and F. A. Remley sufficiently appears.

II. The next question presented is as to whether the court erred in directing the clerk to affix the seal of the proper court, and to return the commission and deposition to the officer named in the commission. The defendant's theory is that, as the motion to suppress was sustained, the commission went for nothing, and that a new commission should have been issued and the deposition retaken. But the order sustaining the motion must, we think, be taken in connection with the order for the re-issue of the commission properly sealed. The suppression

2. — : wrong
seal to com-
mission :
amendment :
practice.

of the deposition was merely provisional. It was made because an irregularity had occurred, and was to continue only until the irregularity could be corrected and the deposition be refiled with the proper evidence that the irregularity had been corrected. This appears clearly enough to have been the intention of the court, when both orders are considered together. Perhaps the safer and better practice would be, ordinarily, where through mistake a deposition has been taken under an unsealed commission, to cause a new one to be issued, that the testimony of the witness may be taken under it. The statute certainly contemplates that the person before whom the deposition is taken shall be clothed with the specific power at that time, and an unsealed commission can hardly be deemed to have that effect. But when it appears with reasonable certainty that no prejudice has been wrought by the reissuance of a commission, as in this case, we do not think that we should be justified in holding it to be erroneous. Whatever irregularity there may have been, it may, we think, be looked upon as an unimportant deviation, and insufficient, under section 3741 of the Code, to justify excluding the deposition. It is contended, to be sure, that the irregularity is not an unimportant deviation. The point especially relied upon is, that it was the defendant's right to have the witness so sworn that he should have the penalty of perjury before his eyes, and that the witness in this case was not so sworn, even at the time he was sworn upon being recalled. The claim that the officer was uncommissioned at the time the witness was recalled and resworn must, we think, be predicated upon the theory that a commission can issue only to take a deposition, and not merely to re-swear a witness to a pretended deposition already taken. But we think that, when the commission was properly sealed and reissued, and placed in the officer's hands, he was clothed with power to administer the oath in question to the witness. Any other view, it appears to us, would be extremely technical, and not demanded for the just protection of any one's rights. The views which

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we have expressed we think sufficiently dispose of the objection urged to the manner in which the deposition was taken

III. The deposition was refiled for the third time December 9, 1882. The case was called for trial December 13,

1882. On that day the defendant asked for three days' time to file further objections to the deposition and motion to suppress the same, and, in excuse for not having filed his objections and motion before, he alleged that he had had no notice of the last filing. The court refused to allow him such time. He contends that in this the court erred. He claims that he was entitled to three days' time under the statute. What provision he relies upon he does not point out, but we suppose it to be section 3751 of Miller's Code. That section provides that, when depositions are filed, notice thereof shall be given by the clerk to the attorneys of the parties. It also provides that, where a deposition is filed during the term, a motion to suppress, if made, must be made by the morning of the third day after the deposition is filed, and in any case must be made before the case is reached for trial. In our opinion, the defendant does not show that he was entitled to three days. The deposition had been filed more than three days already. It may be that he had not had notice, but it is not properly shown to us that he had not. Besides, the case was reached for trial on that day, and may have been reached when the request for time was made.

IV. The defendant claims that no entry of the third filing of the deposition was made in the appearance docket until

after the trial, and that the deposition should not for that reason, if for no other, have been read in evidence. But this objection does not appear to have been made in the court below, and we think that it cannot be made here for the first time. The defendant, to be sure, contends that, if no entry was made in the appearance docket, the deposition should be treated as not filed, and not a part of the record, and cites authorities showing

3. — : motion
to suppress:
time of mak-
ing.

4. — : filing
not entered
on appear-
ance docket:
objection too
late on ap-
peal.

that we have so treated pleadings where no entry was made in the appearance docket. To this we have to say that we so treat pleadings, because the statute expressly so provides. There is no such express provision in respect to depositions. The filing of the deposition appears now to have been entered in the appearance docket, and, having been read without objection for want of such entry when read, and having now been certified to us, we should not be justified in discarding it as no part of the record.

V. Some objection was made to the evidence introduced by plaintiff of the contents of letters addressed to LeGrand Byington, and purporting to have the signature of Moore & McIntyre. Whether the objection was well taken we need not determine. As we understand the abstract, the original letters were afterwards put in evidence, being attached to the deposition of one Alexander.

5. EVIDENCE
of letters :
secondary :
error cured.

VI. Coming now to the principal question in the case, and that is as to whether the defendant took title to the land from the county in trust for the plaintiff, we have to say that we think that he did. We have all reached this conclusion upon a separate reading of the evidence; and, while there are some strange facts and circumstances which prevent us from adopting any view that is entirely satisfactory, yet, taking the record as it is presented to us, we cannot say that there is much doubt on which side the preponderance of the evidence lies. So far as this mere question of fact is concerned, we shall content ourselves, as is our custom, with stating the conclusion which we have reached. We could not set out and discuss fully the grounds of our conclusion, without setting out fully the evidence upon both sides; and this would serve no useful purpose, but merely encumber the reports. We have to say, however, that, connected with the determination of the question of fact, some legal questions are presented, upon which it is proper that our views should be briefly set forth.

Byington v. Moore.

VII. The defendant contends that no implied trust is shown in this case, because such is not the purport of the plaintiff's averment, and that no express trust is shown, because the plaintiff's evidence of a trust is not in writing. The plaintiff, after averring that the title to the land described in the contract had become clouded and in dispute, and after averring that his legal guardian, LeGrand Byington, employed the defendant as attorney for him in the settlement of the difficulties, made an averment in these words: "But your petitioner avers that the said defendant fraudulently, and wholly without authority, claimed and represented to the board of supervisors of Page county that he was the legal holder of said contract, and entitled to the benefits and proceeds of the same, and that, in virtue and pursuance of such false representations, the conveyance from said county of said lands above described was made directly to said defendant, instead of to your petitioner."

Where the holder of an equitable title to lands employs an attorney to procure for him the legal title, and the attorney, by fraudulent representations that he is the equitable owner, procures the legal title to be conveyed to himself, the employer still remains the equitable owner, and the law by implication charges the attorney as trustee of the legal title for his employer. The case differs widely from *Burden v. Sheridan*, 36 Iowa, 125, cited and relied upon by the defendant. Burden had not become the equitable owner of the land, nor had he any interest whatever at the time of his alleged employment of Sheridan. The purchase of the land was yet to be made. In the case at bar, we think that the petition clearly shows an implied trust. It was competent, therefore, for the plaintiff to establish it by parol.

VIII. A question is raised by the defendant in regard to the delivery of the assigned contract to the plaintiff. The assignment was written when the plaintiff was less than two years old, and according to the evidence the contract passed into the defendant's

6. ATTORNEY
and client:
attorney
guilty of
fraud charged
as trustee.

7. CONVEY-
ANCE: deliv-
ery of: facts
constituting.

hands before the plaintiff was ten years old. Probably it never actually passed into the plaintiff's hands. But the assignor had been appointed his guardian, and, according to the view which we take of the evidence, he as such guardian employed the defendant for the plaintiff, and delivered to the defendant the contract as the attorney of the plaintiff. If we are correct in this, there was a sufficient delivery.

IX. The defendant contends that the evidence shows that the assignment, if made, was made to enable the assignor to defraud his creditors. We have not thought it proper to go into any inquiry as to what the fact was in this respect. If it should be conceded that such was the object, the assignment was good as against the assignor. The plaintiff as assignee could employ an attorney, and the attorney could not set up the fraud to enable himself to escape his express and implied obligations.

X. The defendant insists that, if he is to be charged as trustee, he should not be charged for the entire land and proceeds. His theory is that he should only be charged for such proportion as the amount paid by the plaintiff's assignor bears to the whole amount paid as purchase money.

Where one person receives money from another to invest for him in real estate, and he adds certain money of his own, and invests the whole together, and takes the title in his own name, it may be conceded that he should be charged as trustee for only a proportionate share. But the case at bar is different. The plaintiff had become the equitable owner of the entire property, subject to the payment of the balance of the purchase money. If the bargain was a good one, as it appears that it was, the plaintiff was entitled to the benefit of it. We do not think that the case is one which would justify us in charging the defendant proportionately.

XI. The court below allowed the defendant for taxes paid on the land, but allowed him nothing for taxes paid on the

S. ATTORNEY
and client:
fidelity re-
quired.

a. — : inf-
delity not re-
warded.

10. —: fraud of attorney: accounting: evidence considered. proceeds of the sales of land which he made. Possibly, if these proceeds had been kept distinct, and the amount of taxes paid thereon had been shown, he should have been allowed for the taxes paid. But the evidence shows that the defendant used the money, and it is not shown what specific investments were made with it. We can not know, therefore, how the property was assessed which was purchased with the money, nor what amount of taxes was paid, if any. Any finding that the court should attempt to make would be only a loose estimate, and one not based upon any reliable evidence. We do not think, therefore, that we should be justified in making an allowance for such taxes.

XII. The defendant claims that he expended money in employing attorneys to aid him in the matter of the title to these lands, and that he ought to be allowed for such expenditure. The evidence shows that the defendant employed attorneys, and paid in one instance \$750, and in another \$300, but it is not shown that this money was paid for services rendered exclusively in the plaintiff's matters, and we infer from the evidence that it was not.

We have considered the principal questions presented on the defendant's appeal. We have not attempted to answer all his positions. We could not do so without unduly extending this opinion. It must suffice for us to say that we have examined them all, and do not think that they are well taken.

XIII. The plaintiff appealed upon the ground that the amount allowed the defendant was too much. The court allowed the defendant \$1,150 as balance of purchase money paid by him, and a decree was entered upon that basis. We think that the allowance was justified by the evidence then before the court. Afterwards the plaintiff sought to introduce other evidence upon the point. The decree entered provided for the introduction of other evidence in regard to the amount of taxes paid, but not in regard

Finn v. Finn.

to the amount of purchase money paid. The court, therefore, refused to consider the plaintiff's evidence upon the latter point.

The plaintiff claims that he was not too late, because, in making up the issues, no claim was made by the defendant

11. EVIDENCE: to be reimbursed for payments or expenses, and offered after submission of cause: practice. that, as the court had allowed the defendant to testify to payments when the plaintiff was not fully prepared to rebut him, he should be allowed to introduce his evidence in rebuttal at the subsequent hearing set for specific matters, though this was not embraced among them. As to the issues, we think it sufficient to say that the plaintiff called for an accounting. The parties introduced evidence in relation to it. No objection appears to have been made to the evidence. The parties submitted the case upon the evidence as a finality, so far as the point in question is concerned. After decree rendered as a final decree upon this point, we do not see how the plaintiff could properly claim that he was entitled to introduce further evidence. On both appeals we think that the decree must be

AFFIRMED.

62	482
91	240

62	482
130	38

FINN V. FINN.

1. **Husband and Wife:** ACTION FOR ALIMONY ALONE: MEANS OF PROSECUTION. Where the wife is separated from the husband on account of conduct on his part justifying such separation, a court of equity will entertain an action by the wife against the husband for alimony, though no divorce or other relief is sought; (*Graves v. Graves*, 36 Iowa, 310;) and in such case the court will require the husband to furnish the wife the means of prosecuting such action. This decision is grounded upon well settled principles of equity and considerations of public policy, and not upon any statutory provision.

Appeal from Winneshiek District Court.

THURSDAY, DECEMBER 13.

The petition alleges, in substance, that plaintiff was mar-

ried to defendant May 8, 1879, and, with the exception of a short time, continued to cohabit with defendant until January 8, 1883; that about January 1, 1883, defendant commenced to abuse and ill treat plaintiff, calling her a thief, and demanding explanations, and informing her that she could no longer live with him, or be supported by him, unless explanations of his accusations were made, of which plaintiff was not guilty; that, on account of the violent abuse and unreasonable language of defendant, plaintiff was compelled to seek board and lodging elsewhere; that after plaintiff was compelled to leave defendant's home, he circulated among her friends and neighbors false and scandalous stories concerning plaintiff's chastity, knowing them to be false and without foundation; that during the last year of plaintiff's living with defendant, he ill treated her to such extent as to render her living with him detrimental to her health; that defendant peremptorily refused to support plaintiff, or allow her in his house; that plaintiff has no property, and is dependent on her own labor for support, and is unable to obtain employment, and compelled to incur indebtedness against defendant for board and lodging. Plaintiff prays that the defendant may be decreed to pay such sums of money for her support and clothing as may be equitable. The defendant, for answer, admits the marriage and cohabitation to December 27, 1882, and denies the other allegations of the petition. The plaintiff thereupon moved the court for temporary alimony and attorney's fees, supporting the motion by the following affidavit of plaintiff: "That she is plaintiff in this action. That it is brought to obtain a decree of separate maintenance. That she has no money or property, and barely sufficient clothing to be comfortable. That defendant is her husband, and has refused and still refuses to support her or contribute toward her clothing, and has circulated evil reports about her to injure her character among friends and neighbors. That deponent is entirely destitute of means to employ attorneys to prosecute this action, or to

provide for her support, and asks that this court order and direct defendant to pay plaintiff such sums of money as shall be necessary for her support and attorney's fee, and to procure testimony during the pendency of this action."

The defendant filed his affidavit, an abstract of which is as follows: "I am defendant. This action is for alimony or separate maintenance, and not for a divorce. That plaintiff has clothing in abundance as to kind, quality and quantity. I am plaintiff's husband, and have never refused to furnish her clothing. I deny that I have circulated reports, or said anything concerning her character prior to her abandonment of defendant, to-wit: January 8, 1883, nor prior to commencement of this suit, nor then. Defendant provided plaintiff with a home, clothing and support, and never refused so to do, and does not now. But plaintiff, without cause or excuse, willfully abandoned defendant, without defendant's fault, and did so by reason of her own fault and misconduct, and in her own wrong. In support of this, defendant's affidavit, defendant adds his answer, filed in this cause. Plaintiff has, or should have, \$50 or \$75 of money received of defendant, and she has no children, and has health and capacity to earn money."

The court thereupon ordered that defendant pay the plaintiff \$105 to enable her to carry on this action, and denied the motion for temporary alimony. The defendant excepted and appeals.

L. Bullis, O. Wellington and G. W. Adams, for appellant.

Brown & Portman, for appellee.

DAY, CH. J.—This court has held that a court of equity will entertain an action brought for alimony alone, and will grant the same, though no divorce or other relief is sought, when the wife is separated from the husband on account of conduct on his part justifying the separation. *Graves v. Graves*, 36 Iowa, 310. It is said that this court has never

gone beyond the doctrine of this case, and has never held that the husband could be required to furnish the wife the means of prosecuting such action. But such a holding seems to be but a mere corollary of the decision in *Graves v. Graves*, *supra*, for it would be but mockery to allow the wife the right to maintain an action for separate maintenance, and, at the same time, deny her the means of prosecuting it. Ordinarily the joint accumulations of the husband and wife are in the possession and under the control of the husband. This is the foundation of the equitable rule which requires the husband to furnish the wife the means of prosecuting or defending an action for divorce. And, if an action for separate maintenance can be maintained, there is just as much reason and just as much necessity for requiring the husband to furnish the means for prosecuting it, as for requiring him to furnish the means for prosecuting an action for divorce. It is said that there is no statute authorizing the court to require the defendant to pay money to enable the plaintiff to prosecute an action of this kind, as there is in the case of a proceeding for divorce. See Code, § 2226. Neither is there any statute authorizing the wife to institute an action for alimony where no divorce is sought. Yet this court held that, upon well settled equity principles, and upon considerations of public policy, such action might be maintained. The same principles of equity and considerations of public policy authorize a court to require the husband to provide the means of prosecuting such action, when instituted. Specific statutory provision is not essential to the exercise of this power. The court did not err in making the order complained of.

AFFIRMED.

COATES, ADM'X, v. THE BURLINGTON, CEDAR RAPIDS &
NORTHERN R'Y CO.

1. **Evidence: WITNESS SHOULD STATE FACTS, NOT OPINIONS.** The opinions of a witness as to whether or not, when a train of cars was in motion, a person could go between the cars and uncouple them, and at the same time see whether a frog in the track was blocked, must have been a conclusion drawn from a complication of circumstances, and should not have been admitted in evidence in this case. The witness should have been asked for the facts. It was for the jury to draw their own conclusions from them.
2. **Railroads: CUSTOM TO BLOCK FROGS: NEGLIGENCE: EVIDENCE.** Where the negligence complained of was that defendant had failed to block a frog in its track, it was proper to allow plaintiff to prove (without averring it in his petition) an order and custom on the part of defendant to block all frogs along its lines, for the purpose of showing an admission that frogs unprotected are dangerous to employees.
3. ———: **DEATH THROUGH NEGLIGENCE: LIFE TABLES AS EVIDENCE.** The standard tables, showing the life expectancy of people of different ages, have been too long conceded to be competent evidence in cases of permanent personal injuries to railway operatives to be even questioned.
4. **Instructions: ASSUMPTION OF CONCESSION NOT MADE.** Where the negligence complained of was the dangerous condition of a frog, and defendant averred in its answer that the deceased "could well have known of its location and construction, and the dangers thereof, if any such dangers existed in fact," this was not a confession and avoidance of the dangerous condition of the frog, and an instruction based upon the theory that it was was erroneous.
5. **Railroads: INJURY TO EMPLOYEE: EMPLOYEE'S KNOWLEDGE OF THE DANGER: BURDEN OF PROOF.** In an action for personal injury through the negligence of a railway company, after the defendant has shown that the plaintiff knew of the dangerous condition of the road or machinery which he aided to operate, it is then incumbent on the plaintiff to show that he was in some manner justifiable in exposing himself to the danger, before he can recover. And the rule is not different when the injury results in death, and the action is brought by the administrator.
6. ———: **PERSONAL INJURY: MEASURE OF DAMAGES: INSTRUCTIONS TOO GENERAL.** In such case an instruction to the jury that "the measure of damages will be such sum, not to exceed the amount claimed, as they may find from the testimony in the case will compensate for the loss sustained by the injuries, taking into consideration all the testimony having a bearing thereon," was not sufficiently explicit. For the elements of damage in such a case, see *Donaldson v. Railroad Co.*, 18 Iowa, 280.

62 486
106 88
62 486
110 44
62 486
1126 29

Appeal from Linn Circuit Court.

THURSDAY, DECEMBER 13.

THE plaintiff is the widow of J. Q. Coates, deceased, and the administratrix of his estate, and she seeks to recover damages for injuries resulting in the death of the deceased, from being caught in a frog and run over by one of defendant's trains, while engaged in coupling cars at Vinton, in this state.

There was a trial by jury, which resulted in a verdict and judgment for plaintiff for \$5,000. Defendant appeals.

J. & S. K. Tracy, for appellant.

Mills & Keeler, for appellee.

ROTHROCK, J.—I. The deceased was about twenty-five years of age, and had three or four years' experience on railroads as a brakeman and switchman. He had been in the employment of defendant as a brakeman on freight trains for about two months previous to his death. At the time of the accident he was assisting in making up a freight train at Vinton. In performing this service, he was on top of the cars, and was directed to cut off two cars from the train. He descended from the cars and signaled the engineer to back up. The signal was obeyed, and the train was backed very slowly. Immediately upon giving the signal, Coates stepped between the cars to pull the pin. He made one or two steps along with the moving train, when his foot was caught and fastened in the angle of a frog in the track, and he was run over, receiving injuries from which he died in a few hours.

It is not and cannot be claimed that any employe of the defendant was negligent in directing deceased to uncouple the cars, as to the time and manner of directions given to him, nor that there was any negligence upon the part of the engineer. The evidence was undisputed that the train was

backed very slowly, and that deceased took but a step or two after he went between the cars, when he was caught in the angle of the frog. The train was stopped so suddenly that only one pair of trucks passed over him.

About fifteen days before the injury, the defendant had put in a temporary spur track east of the switching yard at Vinton, for the purpose of moving earth to fill in a short piece of track. This spur track was not used for regular trains or cars, but simply for short dump cars hauled by horses. It was connected with the main track by the frog in which deceased caught his foot and was injured.

It is averred in the petition that the "defendant negligently constructed the same, (the spur track,) and negligently omitted to put blocks in the frogs at the intersection of the rails of said main and side track, or provide other safeguards between said rails, in the frog, or crotch, or intersection, at or near said switch, and whereby the employes of defendant using said track were wrongfully exposed to great danger and hazard."

The defendant in its answer denied the averment of negligence, and averred that "decedent was guilty of contributory negligence and want of proper care and caution at the time, in so carelessly walking upon said track as to get his foot fastened in the frog therein; that deceased knew of the existence of said frog, its location and the manner of its construction, and made no objection thereto, and was promised no change therein; that he was an experienced brakeman, and had often worked about this frog and track, and by the exercise of reasonable care and caution could well have known of its location and construction, and the dangers thereof, if any such dangers existed in fact, and yet made no complaint, and no promise of change was made therein, and wherefore defendant asks judgment for costs."

The plaintiff introduced a witness who was a brakeman, and he was examined as follows:

"Ques. Now, in the practice of uncoupling cars, what

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1. EVIDENCE: danger is there, if any, from frogs? What danger is there to brakemen in moving along the track? What danger is there from frogs in moving along the track uncoupling?" (Objected to as incompetent.)

Ans. "They are very dangerous if you get your foot into them."

Another witness was asked this question:

Q. "Provided two cars were together, and a person between the cars in motion, uncoupling, could he uncouple the cars, and at the same time see whether or not there was a frog upon the track at that place?"

A. "He could not when the train was in motion."

Q. "If a person were between two box freight cars moving while he was uncoupling the cars, could he tell whether a particular frog along the track was blocked or not blocked?"

A. "Well, that would depend upon circumstances altogether, the speed the train was going, and how much time he had to look around."

Q. "Well, in the act of uncoupling cars?"

A. "Well, no, sir. If a train was in motion, and a man was not looking for that frog, he couldn't see it if he went in to uncouple cars."

The questions above set out were objected to as incompetent, and in regard to those asked of the last witness the ground of incompetency was that they called for an opinion of the witness. The objections were overruled, and the defendant objected, and assigns the rulings as error.

There is some doubt in our minds as to whether the objection to the first above question was sufficient, in that it did not state that the question called for an opinion. The objections to the questions propounded to the other witness were sufficiently explicit, and in our opinion they should have been sustained. They call for an opinion of the witness as to whether or not, when the train was in motion, a person could go between the cars and uncouple them, and at the

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same time see whether a frog in the track was blocked. This is not a fact. It is an opinion of the witness based upon a complication of circumstances. It involves the questions as to the distance between the cars, the movement of the train, and the attention of the party making the coupling to the act in which he was engaged. It will be observed that it is not a mere inquiry whether a particular object can be seen from a given position. The answers to the question impliedly concede that it is not physically impossible to stand or walk between two box cars coupled together, and at the same time see a frog in the track; but whether seen or not would depend on circumstances altogether—"the speed the train was going, and how much time he had to look around." These circumstances were proper facts to present to the jury, but to group them together and allow a witness to give his opinion or conclusion upon them was, in our opinion, clearly erroneous. It was a question for the jury to determine from all the facts whether the deceased, in the exercise of proper diligence, could or should have seen the frog and avoided the injury. *Hamilton v. R. R. Co.*, 36 Iowa, 31; *Belair v. R. R. Co.*, 43 Id., 662; *McKean v. R. R. Co.*, 55 Id., 192; *Allen v. R. R. Co.*, 57 Id., 623.

II. The plaintiff, among other things, proved an order and custom of the defendant to block all frogs along the line of its road. This evidence was objected to, and
 2. RAILROADS: custom to block frogs: negligence: evidence: it was urged that the same was incompetent, because no such custom or order was pleaded, and that the omission or observance of the order was not in issue.

We think the evidence was not incompetent. There was an issue to which it was applicable. The negligence complained of was the failure to block the frog, or provide other safeguards at the angle in the frog. To aver that the defendant by an order had required all frogs to be blocked, and that the order was not observed as to this particular frog, would have been merely pleading evidence tending to show

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negligence. The existence of a general order of this character was important only as a circumstance in the nature of an admission that, without some protection, frogs are dangerous to employes whose duty requires them to go upon the track in close contact with moving trains. It will be understood that, while we hold this evidence as competent, we do not determine that the failure to block this particular frog was negligence. It was a proper fact to be taken into consideration by the jury in connection with the other facts in the case, such as that the frog was placed there for a temporary purpose, its location with reference to the switching yard, and other facts disclosed in evidence.

III. The plaintiff introduced certain life tables, showing the probable duration of the life of a person of decedent's age. The evidence was objected to by the defendant. It is conceded that the tables introduced in evidence are the standard in common use in this country, but it is objected that they are not competent evidence as to the probable duration of the life of a person engaged in extra hazardous and dangerous vocations.

We think this evidence, in cases of permanent personal injuries to railway operatives, has been too long conceded to be competent and proper to be now questioned.

IV. The court gave to the jury the following instruction, at plaintiff's request:

"2. Defendant claims that said Coates was an experienced brakeman, and actually knew, or by the exercise of ordinary care could have known, that the frog where he received his injury was not blocked, and was in a dangerous condition, and that, by remaining in defendant's employment thereafter, without protest, or promise of amendment of the defect, he assumed such risk, and waived any right to recover for injuries caused thereby. Upon this question the jury are instructed that said Coates, by entering into and remaining in defendant's service, assumed only the ordinary risks directly connected with his

3. — : death through negligence: life tables as evidence.

4. INSTRUCTIONS: assumption of concession not made.

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immediate employment as a brakeman, and did not assume any risk or dangers resulting from a defective and dangerous track, or frog, unless prior to the time of his injury he actually knew, or by the use of reasonable and ordinary care, under all the circumstances, should have known, that the particular frog where he was injured was in a defective and dangerous condition, and thereafter remained in defendant's employment, using such track and frog without objection, or promise of amendment of such defect."

This instruction is complained of, because it assumes that the defendant conceded that the frog was in a dangerous condition. We think the objection is well taken. Appellee claims that the defendant pleaded a confession and avoidance by averring that the deceased knew, or by the exercise of ordinary care might have known, of the condition of the frog, and that he made no objection thereto, and was promised no change therein, whereby he assumed the risk. By an examination of the averments of the answer, it will be seen that the defendant does not admit that the frog was in a dangerous condition. It is therein stated that the deceased "could well have known of its location and construction, *and the dangers thereto, if any such dangers existed in fact.*" We know of no rule of pleading which would have required the defendant to admit that the frog was in a dangerous condition, in order to avail itself of the defense that deceased knew of its actual condition and made no complaint thereof.

V. The court further instructed the jury to the effect that, if deceased had knowledge of the condition of the frog, and continued in the employment of the defendant, and made no complaint thereof, and was not promised a change, there could be no recovery, and that the burden of proving the same is on the defendant.

It is urged that this instruction was erroneous, because it not only required the defendant to prove that the deceased

B. RAILROADS:
injury to em-
ployee: em-
ployee's knowl-
edge of dan-
ger: burden
of proof.

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had knowledge of the defect, but also to prove that he did not make complaint thereof and was not promised a change therein. In *Wells v. R. R. Co.*, 56 Iowa, 520, it is held that the burden rested upon the defendant to prove the affirmative allegation of the defense, to the effect that the plaintiff had knowledge of the alleged danger to which he was exposed.

We think that, when the defendant has shown that fact, it may well rest upon it as a defense, and that, in the absence of some excuse from the plaintiff for exposing himself to dangers known to him, there can be no recovery. It is a general rule (subject of course to some exceptions) that a party to an action is not required to establish the negative of a proposition. When the defendant shows that the plaintiff knew of the dangerous condition of the road or machinery which he aided to operate, it is then incumbent on the plaintiff to show that he was in some manner justifiable in exposing himself to the danger. The fact that such proof cannot be made in some cases where the injury results in death, is no reason why the rule, that the party who holds the affirmative of an issue is required to assume the burden of proof, should not be enforced. If the burden had been held to rest on the defendant to prove the negative, it would have been required to introduce as witnesses all of its officers and employes to whom such notice might properly be given, and prove by them that no complaint was made.

VI. The court further instructed the jury as follows:

"9. If you find for the plaintiff, the measure of damages will be such a sum, not to exceed the amount claimed, as you find from the testimony in the case will compensate for the loss sustained by the injuries, taking into consideration all the testimony before you having a bearing thereon."

a. — : personal injury : measure of damages : instruction too general.

This instruction should have been more explicit in defining the measure of damages to which the plaintiff was entitled, if any. For the elements of damages properly

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entering into cases of this character, see *Donaldson v. R. R. Co.*, 18 Iowa, 280.

For the errors above pointed out, the judgment will be reversed, and the cause remanded for a new trial.

REVERSED.

82 494
104 659

THE BUCHANAN COUNTY BANK V. THE CEDAR RAPIDS, IOWA
FALLS & NORTHWESTERN RAILWAY COMPANY, GARNISHEE.

1. **Railroads: RIGHT OF WAY: CONDEMNATION BY THIRD PERSON UNDER CONTRACT: RIGHTS OF THE PUBLIC: GARNISHMENT.** Where a railroad company contracts with a person to furnish at a given sum per mile its right of way at his own expense, purchasing and condemning in the name of the company, *held* that the public and land-owners were not bound to take any notice of the intermediate contractor, but that as to them the company was the only responsible party; and where a right of way had been condemned by the contractor, and the award paid to the sheriff, but the land-owner had taken an appeal, and the company had been garnished by a judgment creditor of the land-owner, *held*, further, that the contractor was bound to take notice of the garnishment, and his payment of an additional sum to the land-owner in settlement of the appeal, and for a deed for the right of way in question, did not exonerate the company from liability as garnishee to account for the additional sum so admitted to be due to the land-owner, and judgment in this case was properly rendered against it as garnishee for such sum.
2. **Appeal to Supreme Court: LESS THAN \$100: CERTIFICATE MUST BE SPECIFIC.** The certificate required to give this court jurisdiction of an appeal in a case involving less than \$100 must be sufficient in itself to present the questions to be determined, and must not refer the court to the record to ascertain such questions.

Appeal from Kossuth Circuit Court.

THURSDAY, DECEMBER 13.

THE plaintiff is the owner of a judgment against B. W. Cronan. An execution was issued on the judgment, and the defendant was garnished as a supposed debtor of Cronan, which alleged obligation or debt grew out of a claim for com-

The Buchanan Co. Bank v. Cedar Rapids, Iowa Falls & N. W. R'y Co., Garnishee.

pensation for right of way which defendant had condemned through certain land of Cronan. A trial was had without a jury, and a judgment was rendered for the plaintiff for \$50. The garnishee appeals.

Soper, Crawford & Carr, for appellant.

Geo. E. Clarke, for appellee.

ROTHROCK, J.—The amount in controversy does not exceed \$100, and the case comes to us upon a certificate from the trial judge, of which the following is a copy: “1. Where the above named garnishee in constructing its line of railway contracted with an individual to furnish, for a given sum per mile, its right of way at his own expense, which he was by the terms of said agreement to procure, and did procure, by purchase and condemnation to the garnishee, in the name of said garnishee, and when, after condemnation had on June 27, 1881, the land-owner, on July 10, 1881, appealed from the award of the sheriff’s jury of \$250, which had been paid to the sheriff and garnished by judgment creditors other than plaintiff, and plaintiff having, on the seventeenth day of July, 1881, served the garnishment on garnishee, as shown by the agreed statement of facts herein, can the railway company, in whose favor the condemnation is made, be garnished by another judgment creditor, (the plaintiff,) and held to pay to such creditor the amount, additional to the deposit with the sheriff, which the party furnishing its right of way paid to the land-owner for a deed for right of way through the property, in the absence of actual knowledge of any garnishment?”

“2. Where condemnation proceedings were had in the name of the garnishee herein, and the award was paid to the sheriff and an appeal taken by the land-owner, who was the plaintiff’s judgment debtor, and when plaintiff garnished the railway company condemning, could the railway company pur

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chase for cash during the pendency of such appeal, and take a deed for right of way, without becoming liable to pay any sum in excess of the award to the garnisheeing creditor under the said process of garnishment?

"3. Under the facts shown in the first question, *supra*, and in the agreed statement of facts, was there ever any indebtedness due, or to become due, from the railway company to the defendant, Cronan, such as under our statute could be the subject of garnishment?

"4. When the garnishee condemned the right of way, paid the amount of the assessment to the sheriff, and took possession, did such proceedings, where the land-owner appealed from the amount of the assessment, create a *liability* on the part of the railway company which could be the subject of garnishment? Is not such liability, if any, a contingent one, and under our statute is a contingent liability the subject of garnishment?

"5. Under the facts stated in the fourth question, *supra*, and in the agreed statement of facts, are not any increase of damages that may be awarded upon an appeal, over and above the amount found by the sheriff's jury and deposited with the sheriff by the railway company, unliquidated damages, and as such not liable to be garnished?

"6. Was service of the notice of garnishment upon A. W. McFarland, who was employed by said Dows, the party furnishing the right of way under contract, as set out in the agreed facts, as the local attorney of garnishee in Humboldt county for the purpose of assisting Dows in procuring such right of way through Humboldt county, such service of notice of garnishment as would be good and sufficient service of garnishment upon the railway company, garnishee?

"7. Upon the agreed facts in this case, was the garnishee liable for the sum of \$50, as held by the trial court in its judgment herein."

We do not think that the employment of Dows by the railroad company to procure its right of way at a fixed price

The Buchanan Co. Bank v. Cedar Rapids, Iowa Falls & N. W. R'y Co., Garnishee.

per mile is at all material in determining the rights of the parties. Dows did not condemn land for right of way so far as the public was concerned.

The railroad company was the party liable to land-owners for compensation for right of way. Land-owners could sue the railroad company and enjoin it, and take all other proper legal action pertaining to the right of way. But they could take no action against Dows. It follows that, if a land-owner had a valid claim, the railroad company would be the proper party to garnish, and, upon the garnishment being made, all of its agents, whether employed to procure right of way at a stated sum per mile, or otherwise, were bound to take notice of the garnishment, and govern themselves thereby.

It is claimed that the court should have held that Cronan's claim for an increase of compensation, which he was asserting by his appeal, was a mere contingent liability, and not subject to garnishment. We think otherwise. Cronan claimed by his appeal that he was entitled to more than \$250 compensation. It is true, this was contingent upon a trial in the circuit court, but the garnishee removed this contingency by paying Cronan \$50 in excess of the award of the sheriff's jury. This was the legal effect of the transaction between Cronan and the railroad company. It was not a new arrangement having no connection with the original proceedings to condemn the right of way. Its effect was to pay Cronan \$50 in addition to what had already been paid.

The foregoing observations, we think, determine all questions certified, excepting the sixth, which involves the sufficiency of the service of the garnishment notice on McFarland. We are referred by that interrogatory to certain agreed facts to determine, in part at least, the nature and scope of McFarland's agency. We have repeatedly held, and our rules require, that certificates in this class of cases must set out the questions which it is desirable shall be determined. The rule

2. APPEAL TO
supreme
court: less
than \$100:
certificate
must be
specific.

Spargur et al. v. Hall.

is not complied with by referring us to the record in the case to determine what the question is. We find no error in the case.

AFFIRMED.

SPARGUR ET AL. V. HALL.

1. **Contract: PROCURED BY UNDUE INFLUENCE UPON A FEEBLE MIND: SET ASIDE.** Contracts made between persons sustaining relations of trust and confidence, where it appears that the stronger and controlling mind has obtained an advantage, are jealously watched and guarded by courts of equity, and are set aside, unless the beneficiary shows the good faith of the transaction; and in this case, where a daughter, through undue influence, and without adequate consideration, procured from her aged and infirm mother the execution of a note, and a mortgage securing the same, *held* that the court below properly canceled these obligations upon the petition of the heirs of the mother.

Appeal from Montgomery Circuit Court.

THURSDAY, DECEMBER 13.

B. W. SPARGUR died intestate in the year 1880. He was the owner of a residence in the village of Villisca, and of a farm in that vicinity. Mary Spargur was his widow, and entitled to one-third of his real estate. After his death she continued to occupy the residence in the village, and Sarah M. Hall, a daughter, with her family, also occupied the residence, under a contract to board her mother for a certain compensation. Mary Spargur died in February, 1881, and some seventeen days before her death she executed to Sarah Hall a note for \$800, and a mortgage upon the undivided one-third of the farm to secure the payment of the note. At the same time she made a written agreement with Sarah Hall providing for her future support.

This action was commenced by the administrator of Mary Spargur, and by the other children and heirs of B. W. and

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79	40
62	498
117	171
62	498
121	227
62	498
126	604
62	498
132	568
133	682

Spargur et al. v. Hall.

Mary Spargur, to cancel the note and mortgage, upon the grounds that, at the time they were executed, Mary Spargur was old and feeble in body and mind, and mentally incompetent to make such a contract; and that defendant took advantage of her condition, and by undue influence and persuasions, and by false pretenses, induced her to sign said written instruments; and that the same were without consideration, and void. The cause was referred to a referee, who found for the plaintiffs, and a decree was entered canceling the note and mortgage as prayed. Defendant appeals.

F. P. Greenlee and C. E. Richards, for appellant.

W. H. Redmon and W. S. Strawn, for appellees.

ROTHROCK, J.—Mary Spargur was in her seventy-third year at the time of her death. The following extract from the finding of facts by the referee is fully supported by the evidence: “At the time of the execution of the note, the said Mary Spargur was old and in feeble health. She was suffering with rheumatism, and had been afflicted for nearly forty years with a female complaint. Her husband died nearly a year previous, after having lived many years with said Mary Spargur; that during his lifetime he transacted all the business; that she had very little knowledge of business matters; that after her husband’s death she transacted none, save the matter in question; that Mary Spargur, at the date of the execution of the note and mortgage in question, had a contracting mind, but her mind, by reason of her age, infirmities and loss of her husband, was not strong; that by reason thereof, and through want of knowledge of business, she could easily be directed to erroneous results and false conclusions.”

The referee found that the note and mortgage were entirely without consideration, and were executed by her by reason of misrepresentations, and without an understanding of the facts.

An important consideration in determining this case is the relation which is shown to have existed between Mary Spargur and her daughter, the defendant. The relation of confidence and trust reposed in the defendant by her mother is clearly shown by the fact that she took her daughter into her home, and relied upon her as her helper and support in her old age and infirmity. Contracts made between persons sustaining these relations of trust and confidence, where it appears that the stronger and controlling mind has obtained a conveyance of property or an obligation to pay money, are jealously watched and guarded by courts of equity, and set aside, unless the beneficiary shows the *bona fides* of the transaction. Kerr on Fraud and Mistake, 150-1-2; *Leighton v. Orr*, 44 Iowa, 679; *Tucke v. Buchholz*, 43 Id., 415. Applying this rule to the facts of this case, we think the decree of the circuit court is correct. The only showing of a consideration for the note and mortgage is that the defendant presented a claim against B. W. Spargur's estate for services rendered to him after the defendant became of age, and for money loaned to him. It is not shown that this claim was ever recognized by B. W. Spargur. It was presented against his estate, and the administrator refused to allow it. A trial was had thereon in the circuit court, and the evidence was introduced, and defendant procured a continuance in order that she might produce an account book. The account book was not produced, and the case was dismissed, and it is not shown that the claim had any validity. Just before its dismissal, the note and mortgage were executed. The evidence is very clear that Mary Spargur believed that, if the defendant's claim was prosecuted, her interest in the estate would become involved. This belief was unfounded in fact. Her interest in the real estate as widow could not be affected by the claim. It is unnecessary to set out the evidence in detail. It is sufficient to say that we are fully satisfied with the conclusion arrived at by the referee, and with the decree of the court below.

AFFIRMED.

THE IOWA NEWS CO. v. HARRIS ET AL.

1. **Board of Supervisors; SELECTION OF OFFICIAL NEWSPAPERS: CERTIORARI TO REVIEW.** The proprietor of a newspaper has no such interest in the selection by the board of supervisors of the official papers of the county as to enable him to maintain an action of *certiorari* to review the proceedings of the board in making the selection, to the end that his own paper may be selected as one of such papers; and this, even though his paper be one of the two having the largest circulation in the county. See *Welch v. Supervisors*, 23 Iowa, 199; *Smith v. Yoram*, 37 Id., 89.

Appeal from Fremont Circuit Court.

THURSDAY, DECEMBER 13.

THE defendants constitute the board of supervisors of Fremont county. The plaintiff applied for a writ of *certiorari* to test the legality of the proceedings of the board in selecting the Sidney Union Advocate and Farragut News as the official papers of Fremont county. The plaintiff averred in its petition that it is a corporation resident in Fremont county, and publishes the Iowa State News, a weekly paper in said county, and that its paper has a larger circulation than the papers selected. The plaintiff also averred several acts which it alleges are illegal.

The defendants demurred to the petition upon the ground, among others, that the petition showed no such interest on the part of the plaintiff as to entitle it to the writ. The court sustained the demurrer and rendered judgment for defendant for costs. The plaintiff appeals.

Stow & Hammond, for appellant.

Draper & Thornell, for appellees.

ADAMS, J.—The plaintiff does not aver that its paper is one of the two county papers having the largest circulation.

Kellog v. Gutchens et al.

It does, it is true, aver that its paper "by law was entitled to be selected." But this is an averment of a legal conclusion. Besides, it appears to us that, even if the plaintiff had averred that its paper was one of the two papers having the largest circulation, it would not have shown such interest in the matter that it could be held to be entitled to the writ. The public might suffer from the wrongful action of the board, but we are not able to see that the plaintiff would, unless we could presume that the compensation allowed would be over-compensation, and that we could not do. The question presented appears to have been disposed of in *Welch v. The Board of Supervisors*, 23 Iowa, 199, and *Smith v. Yoram*, 37 Id., 89. In our opinion the court did not err in sustaining the demurrer.

AFFIRMED.

KELLOG V. GUTCHEMS ET AL.

- 1. Mortgage Foreclosure: DECREE FIXING PRIORITY AND DISTRIBUTION OF LIENS: CONSTRUCTION OF.** In the foreclosure of several mortgages on three parcels of ground, the court entered a decree fixing the order of liens and distributing them to the several parcels, and it is *held* that under the decree (see opinion) the sheriff was authorized to sell all the land, and that the court erred in setting aside the sale as to two of the parcels, upon the petition of plaintiff herein.

Appeal from Butler District Court.

THURSDAY, DECEMBER 13.

THIS is an action in equity to set aside a sheriff's sale of certain real estate, and cancel the certificate of sale, upon the alleged ground that the judgment upon which the sale was made was not the indebtedness of the plaintiff, nor a lien upon the land sold. There was a trial by the court and a decree for the plaintiff. Defendants appeal.

H. C. Hemenway, for appellants.

N. T. Johnson and *Horace Boies*, for appellee.

ROTHROCK, J.—It appears that plaintiff was the owner of forty acres of land, and lot 4 in block 1 in an addition to Parkersburg. This land, together with a mill lot in said addition to Parkersburg, was formerly owned by parties who had incumbered all of it by certain mortgages, and the plaintiff held his land and town lot subject to mortgages upon them.

These mortgages were foreclosed. The plaintiff herein, and other parties interested, were made defendants, and the court entered a decree fixing the priorities of the liens, and providing for a sale of the property to pay the amounts due. The question involved in this case arises upon the construction and meaning of the decree of foreclosure. After the rendition of judgments against the several mortgagors for the amounts secured by the respective mortgages, the decree provides:

1st. That the sum of \$1,151.94 shall be a first lien on the mill lot, and a first lien upon lot 4 in block 1.

2d. The sum of \$1,147.20 shall be a second lien upon the mill lot, and a first lien upon the forty acres of land.

3d. The sum of \$2,385.84 shall be a third lien upon the mill lot, and a second lien on lot 4, and a second lien upon the forty acres of land.

4th. The sum of \$2,719.88 shall be a fourth lien upon the mill lot.

5th. The sum of \$2,533 shall be a lien upon the mill lot subject to all of the other liens.

The decree further provided that said lots and land should be sold separately, and the proceeds of the sales be applied first in payment of costs, and the sums remaining should be paid over to the judgment plaintiffs in accordance with the priority of their respective liens upon the several parcels of property as determined in the decree.

The sheriff first offered the mill lot for sale, and it was sold for \$9,500. Next, he offered and sold the forty acres of land for \$543.20, and next he offered and sold lot 4 for \$500.

The plaintiff claims that the last two lots should not have been offered for sale, because the mill lot sold for more than was sufficient to pay the three sums first above named, which were liens on all of the property. For some reason, however, the court by the decree made these liens upon all the property alike. They were liens upon the plaintiff's property equal in every respect to the liens upon the mill lot. The owner of one parcel of the property had no right to insist that the property of another owner should be first exhausted in satisfaction of the liens. It is true, as claimed by counsel for appellant, that the plaintiff's cause of complaint arose upon the mere accident that the mill lot was first sold.

The record before us does not show why the order of the liens was established, as it was, by the decree. There is enough shown, however, from which we infer that a former owner of all the property executed two mortgages thereon, and afterwards sold part of the property to plaintiff, and part to another party. One of these purchasers afterwards executed a mortgage upon the part owned by him. Now, if we understand it, the decree fixed the rights of the plaintiff and the other owner, by requiring that the property of each should bear its just proportion of the mortgage debts. The plaintiff claims that his property should not be charged *pro rata*, because the proceeds of the mill lot were sufficient to discharge the liens common to all.

We do not think this is a proper construction of the decree. The sheriff, under the decree, was required to sell the property and make distribution of the proceeds. He did sell it, but not for more than sufficient to pay all of the liens, and we cannot see that plaintiff has any cause of complaint.

REVERSED.

DEVORE V. ELLIS ET AL.

1. **Easement: PRIVATE WAY TO HIGHWAY: INJUNCTION TO RESTRAIN OBSTRUCTION OF.** Upon consideration of all the facts in this case, (see opinion,) where plaintiff had purchased a private way from his farm to the highway, *held* that he was entitled to have the way kept open, and that defendants, the owners of the adjoining lands, should be restrained from maintaining a fence and gate across the way where it enters the highway.

Appeal from Harrison District Court.

THURSDAY, DECEMBER 13.

ACTION in chancery to restrain defendants from interfering with and obstructing a private way granted plaintiff. Upon a trial upon the merits, plaintiff's petition was dismissed. He now appeals to this court.

L. R. Bolter & Sons, for appellant.

M. I. Bailey and *H. H. Roadifer*, for appellees.

BECK, J.—I. The plaintiff acquired by purchase, in 1876, a private way leading from his farm to a highway. At that time there was a fence along the west line of the way, which divided the land of the grantor of the easement from the property of an adjoining proprietor. By the terms of the written contract under which plaintiff acquired the right of way, he is required to erect and maintain a fence along the east line of the way, which he has done. The original grantor of the right conveyed the land upon which the way is located to one of the defendants, who had full notice of plaintiff's rights in the easement. Plaintiff has been in the possession and enjoyment of the way since the execution of the instrument by which this grant was made. The owner of the land and the adjoining proprietor on the west constructed a fence and gate across the way upon the line of the

public highway, and claims the right to maintain them. Plaintiff denies this claim, and insists that he is entitled to an open way, and brings this action to enforce his right thereto, and to restrain defendants from interfering therewith. We are required to determine whether, under the grant of the easement and the facts of the case, defendants have the right to maintain the gate and fences across the way.

II. The writing granting to plaintiff the easement, as we have stated, obligates plaintiff to maintain a fence between the way and the land of the grantor. It cannot be supposed that it was not the purpose of the parties to have the way inclosed on that side. On the other side there was at the time a fence upon the division line of the lands of the grantor of the easement and the adjoining proprietor. These facts clearly indicate the intention of the parties that the way should be fenced. There is no reservation in the writing of a right to erect and maintain a fence and gate across the way. We cannot presume that such right was reserved. Indeed, we are required rather to presume that plaintiff in purchasing the way acquired the right at his option to keep it open. As it was granted for his use and convenience alone, he ought to have the right, if he so required and demanded, to use it free from all obstructions.

III. But it is insisted that, as before plaintiff purchased the easement the adjacent lands were inclosed in common, it was the purpose of the parties that they should continue in that condition. We draw the contrary conclusion from the facts, and think that the existence of a fence on one side of the way, and plaintiff's covenant to erect and maintain a fence on the other, which he performed, establishes the purpose of the parties to maintain a fenced and open way. It surely cannot be claimed that it was not their purpose to provide for fences along the way. The existence of a fenced lane for the exclusive use of plaintiff implies his right to require it be kept open.

IV. But it is urged that the fence of the adjoining pro-

prietor was and has continued to be in a bad condition, being not sufficient to turn stock. We think this fact does not affect plaintiff's rights. The fence was not in existence when he purchased the easement, and it is not shown that he is under any obligation to keep it in repair. He entered into the contract for the right of way in view of the existence of the fence, and he ought not to be deprived of any rights he acquired by the failure to keep the fence up.

V. It is also claimed that the fence built by plaintiff is not sufficient. The preponderance of the evidence does not support this position. We think it is not shown that plaintiff has so failed to keep it in good repair that he has forfeited his rights under the grant of the way.

VI. During a part of the time that has intervened since the grant of the way, plaintiff has kept a gate across it. This he did for the reason that he had rented and was cultivating the land of the adjoining proprietor, and his convenience did not require him to keep the lane open. It does not appear that any complaint on account of the gate was made by defendants or others, if, indeed, they had a right to complain. When he ceased to cultivate the rented land he removed the gate. We think he forfeited no rights by erecting the gate, and no inference can be drawn therefrom that he did not regard the grant as securing to him an open way.

VII. The preponderance of the evidence shows that, immediately after the purchase of the easement, plaintiff gave to the owner of the adjacent land a written notice of his purpose to fence the lane and open it. If the fact be that the land was inclosed in common, plaintiff was authorized to open the lane six months after the giving of this notice. Code, § 1497.

We reach the conclusion that the district court erred in dismissing plaintiff's petition. The decision is reversed, and the cause will be remanded for a decree granting plaintiff the relief prayed for by him.

REVERSED.

HUSKINS v. McELROY.

1. **Injunction: DISSOLUTION ON MOTION: WHEN NOT GRANTED.** Where a preliminary injunction has been granted upon the allegations of the petition, it will not be dissolved upon the filing of an answer which sets up matter in avoidance of the petition, but the cause will be continued to the hearing, to the end that the evidence of both parties may be heard.

Appeal from Johnson District Court.

THURSDAY, DECEMBER 13.

ACTION IN EQUITY. The relief asked is that an injunction issue restraining the defendant from the commission of certain alleged trespasses, and that the damages for certain trespasses committed be ascertained, and that the plaintiff recover a judgment therefor. An injunction was issued, which the defendant moved to dissolve upon the answer and certain affidavits in support thereof. Affidavits were also filed by the plaintiff in resistance of the motion, which was overruled.

Milton Remley, for appellant.

Baker & Ball, for appellee.

SEEVERS, J.—The petition states that the plaintiff was the owner of certain described real estate. That the defendant was also the owner of certain other real estate, which, or a portion of which, abutted on that owned by the plaintiff. That plaintiff's grantor in 1860 owned the land now owned by the defendant, and that the said grantor conveyed to John P. Hawkins, who in 1865 conveyed to Hines, who in 1880 conveyed to the defendant. The plaintiff's grantor had for his convenience a wagon way from his house over the premises belonging to the plaintiff, and the same was used by the plaintiff's grantor, and other persons owning the defendant's land, by sufferance of the plaintiff, but without legal right

thereto. That plaintiff plowed up the right of way and erected a gate and fence across the same, and the defendant had on more than one occasion torn the same down and entered upon said way. That each act of said defendant in passing over said premises constituted a trespass, and, to prevent a multiplicity of suits, an injunction was asked. The answer admitted the plaintiff's ownership of the premises described in the petition, but denied that the way was used by the defendant and his grantors by sufferance merely, and alleged that it was used under a claim of right for more than ten years. That at the time the plaintiff's grantor conveyed the land to Hines the right of way was used, and had been for years, as an appurtenance to the land so conveyed, and that it passed to said Hines, who continued to use the same until he conveyed it to the defendant, who has used the same since that time. The question is whether the court rightly determined the motion to dissolve the injunction, or abused the discretion invested in it in this respect.

II. We think the facts in this case bring it within the rule established in *Mills v. Hamilton*, 49 Iowa, 105. We are, in substance, asked by counsel for appellee to overrule that case. This we are not prepared to do.

III. In addition to the foregoing, it must be stated that the allegations of the petition in relation to the ownership of the land and the use of the way by the defendant are admitted in the answer. That such use was by sufferance only is, however, denied. But we understand that the defendant seeks to justify the use of the way under claim of right derived from the plaintiff or his grantor. In substance, the defendant, it may be conceded, sets up a right which, if established, will defeat the relief asked by the plaintiff. This being so, we think the motion was correctly overruled, for the reason stated in *Shriker v. Field*, 9 Iowa, 366; *Judd v. Hatch*, 31 Id., 491; *Fargo & Co. v. Ames et al.*, 45 Id., 494. If it can be said that defendant has shown that he is in the actual possession of the right of way under a claim of right, this is merely matter

 Nagle v. Guittar, Sheriff.

which avoids the allegations of the petition, and, therefore, under the rule established in the cases just cited, the cause should be continued to the hearing, so that the proofs as to such facts may be taken by both parties.

AFFIRMED.

NAGEL V. GUITTAR, SHERIFF.

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87 590;

1. **Exceptions:** TAKEN TOO LATE TO BE CONSIDERED. Exceptions to a decision must be taken at the time it is made, (Code, § 2831,) except in the case of instructions to the jury, which may be excepted to within three days after the verdict. Code, § 2789. Exceptions not taken in time will not be considered on appeal.

Appeal from Pottawattamie Circuit Court.

THURSDAY, DECEMBER 13.

ACTION OF REPLEVIN. The cause was tried without a jury, and judgment rendered for defendant. Plaintiff appeals.

M. B. Darnell and Flickinger Bros., for appellant.

Fremont Benjamin, for appellee.

BECK, J.—The only objection raised by the assignment of plaintiff's counsel is based upon the ground that the judgment of the circuit court is in conflict with the evidence.

An amended abstract filed by defendant, which is not denied by plaintiff, shows that no exceptions were taken to the judgment at the time it was rendered, nor until twenty-four days thereafter. Exceptions to a decision must be taken at the time it is made, (Code, § 2831,) except in the case of instructions to the jury, which may be excepted to within three days after the verdict. Code, § 2789. Neither does it appear

Rock & Son v. Singmaster, Garnishee.

that a motion for a new trial was made. We cannot disregard this statute, and review a decision not excepted to at the time therein required. See *Joliet Iron & Steel Co. v. The C., C. & W. R'y Co.*, 50 Iowa, 455. The decision of the circuit court must be

AFFIRMED.

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102	259

ROCK & SON v. SINGMASTER, GARNISHEE.

1. **Attachment: GARNISHMENT: SERVICE OF WRIT: HOW PROVED.**

The return of a writ of attachment is the statutory evidence of what the officer did under it; as, for example, that he attached a certain person as garnishee. And where no return was endorsed on the writ, the garnishee was properly discharged, upon the ground that there was no legal evidence before the court that he had been garnished. The notice of garnishment properly served, and with a return of service indorsed thereon, did not furnish the proper evidence.

Appeal from Keokuk Circuit Court.

THURSDAY, DECEMBER 13.

THE plaintiffs are creditors of one Cable. As such they brought this action in attachment against him before a justice of the peace, and caused a notice of garnishment to be served upon Singmaster as garnishee. The justice rendered judgment against both the principal defendant and the garnishee. An appeal was taken to the circuit court, and judgment was rendered against the principal defendant, but the garnishee was discharged. The plaintiffs appeal.

Sampson & Brown, for appellants.

G. D. Woodin and *I. Farley*, for appellee.

ADAMS, J.—The court discharged Singmaster upon the ground that it had no proper evidence before it that he was

garnished. No return was made upon the writ. The questions certified are as follows:

"*First*—Is a written return endorsed upon or attached to a writ of attachment and signed by the officer the only competent evidence that can be produced of its service, when the writ itself is in evidence; or may the officer who served it, and failed to make his return, be permitted to testify what he did under and by virtue of the writ ?

"*Second*—Where a writ of attachment, notice of garnishment, and notice to the attachment defendant that the person named in the garnishee notice has been garnished, were regularly issued and placed in the hands of the same constable at the same time, and the notice to the garnishee, and also the notice to the attachment defendant of the garnishment, were returned with a written return endorsed thereon, signed by the constable, showing that the notices were properly served, but no return was endorsed on or attached to the writ of attachment, will such facts prove a garnishment, or raise a presumption that the person named in the garnishee notice was attached as garnishee in the case ?"

The return of a writ of attachment is the report of the officer of what he did under it. It is provided for by statute. Code, § 3010. When made, it becomes the statutory evidence of what it purports to show. It must be endorsed upon the writ, or made upon a paper annexed thereto. Code, section above cited. The writ and return constitute essentially one record, and must go together. *Dickson v. Peppers*, 7 Ired., 429; *McCrorry v. Chaffin*, 1 Swan, 307; *Union Bank v. Barnes*, 10 Humph., 244. Filing the writ with no endorsement of the proceedings is no return, but a return may be made by leave of court, upon payment of costs. *Hall v. Ayer*, 19 How. Pr., 91; *Nelson v. Brown*, 23 Mo., 13. If the officer fail to make a return, the court may doubtless direct him to do so. If he refuse, or make a false return, he becomes liable to the party injured. Under the statute and adjudications, it appears clear to us that with-

Lutz v. Gates, Adm'r.

out a return an essential record is wanting, and that the court has before it no proper evidence upon which it can base any proceedings against specific property or credits. The alleged garnishee, we think, was properly discharged.

AFFIRMED.

LUTZ V. GATES, ADMINISTRATOR.

1. **Estates of Decedents: PAYMENT FOR MONUMENT FOR DECEASED.**

A suitable monument may properly be erected to the memory of a deceased person, and the cost thereof paid by the administrator out of the funds of the estate.

Appeal from Linn Circuit Court.

THURSDAY, DECEMBER 13.

THE defendant is administrator of the estate of G. Carpenter, deceased. The plaintiff erected a monument to the memory of the deceased, and sought in this proceeding to obtain payment therefor from the estate. Certain of the heirs at law of the deceased objected to the allowance of the claim, and upon a trial the court refused to allow the claim, and the plaintiff appeals.

Blake & Hormel, for appellant.

West & Davenport, for appellee.

SEEVERS, J.—The objection made to the allowance was not based on the ground that the monument was too expensive, or not otherwise suitable, but because the claim “is not a proper or legal claim against said estate.” Only a portion of the heirs objected, and others are willing that the claim should be allowed. The deceased left a widow, who ordered the monument, and the administrator is willing to allow the

claim, and only formally resists it because of the objections of some of the heirs.

The deceased left personal property to the amount of about \$3,000, and real estate of the appraised value of \$60,000.

The amount of claims filed, including mortgages on the real estate, does not exceed \$20,000. This includes the claim of the plaintiff. Some of the real estate has been sold at a price in excess of the appraisal. There has been set off to the widow as her distributive share about \$16,000, besides the exempt property, consisting of household furniture and a horse. There will be about \$22,500 to distribute among the heirs. At the time the monument was ordered, the widow consulted the administrator in relation thereto, and he gave his consent, and agreed to allow the claim and pay it out of the estate. But he did this upon the belief that the heirs would not object.

The widow consulted some of the heirs—those that were convenient—and they consented it should be paid for out of the estate. But, as we understand, there were heirs that were not consulted. There are other facts which, it is claimed, tend to show that the monument is suitable and proper, and that it should be paid for out of the estate. These are not set out, for the reason that we think the facts above stated control the question before us.

Since this case was determined in the circuit court, the case of *Urapo, Executor, v. Armstrong*, 61 Iowa, 697, has been determined by this court, and, following that case, we think the circuit court erred in sustaining the objection to the claim which was, as above stated, that it is not a proper or legal claim against the estate. The estate is solvent, and, if the charge is not a proper one against the estate, it would follow that in no case could a monument be procured at the expense of the estate.

REVERSED.

DAWS V. CRAIG ET AL.

62	515
138	134
f138	135

- 1. Mortgage: ASSIGNMENT OF NOT RECORDED: FRAUDULENT RELEASE OF BY MORTGAGEE: EQUITIES AS BETWEEN ASSIGNEE AND PURCHASER OF THE MORTGAGED PREMISES.** In 1868, G. W. K. executed a mortgage to J. K., who in the same year sold and assigned it to plaintiff, but plaintiff never had the assignment recorded. In 1880, G. W. K. traded the mortgaged premises to defendants for another tract of land, and conveyances were made accordingly. Defendants at the time knew of the mortgage made by G. W. K., but did not know that it had been assigned by J. K. to any one; and, to secure them against said mortgage, G. W. K. executed to them a mortgage on the land conveyed to him in the exchange. Afterwards J. K., in fraud of his assignee, released of record the mortgage made to him, in consideration of which the defendants, still ignorant of the assignment made by J. K., and innocent of the fraud practiced by him, released of record the mortgage made by G. W. K. to them. *Held* that plaintiff, having, by her negligence in not having her assignment recorded, left the way open for the fraud of her assignor, whereby the defendants, acting in good faith, had been led to a satisfaction of their mortgage, could not have her mortgage reinstated and foreclosed as against the defendants.

Appeal from Butler District Court.

FRIDAY, DECEMBER 14.

ACTION to foreclose a mortgage on real estate, executed by G. W. and Patrick Keenan to James Keenan. The defendants, claiming to be the owners of the mortgaged premises, were made parties to the action, and a decree was rendered foreclosing the mortgage, and defendants appeal.

Craig & Smith and *Gibson & Dawson*, for appellants.

Sheean & McCarn for appellee.

SEEVERS, J.—The undisputed facts, sufficiently stated, are:

First—The mortgage sought to be foreclosed was executed in 1868, and in the same year it was sold and assigned to the plaintiff; but such assignment never was recorded in the recorder's office.

Second—In June, 1880, Geo. Keenan, the owner of the mortgaged premises, conveyed the same to one of the defendants, in consideration of the conveyance to him by the defendants of a tract of land owned by them. This transaction in fact was an exchange of lands.

Third—To secure themselves against said mortgage, Geo. W. Keenan executed to the defendants a mortgage on the land they had conveyed to him.

Fourth—At the time of the exchange of lands and the execution of said conveyances and mortgage, the defendants had knowledge of the existence of the plaintiff's mortgage, and that the same was unpaid.

Fifth—In July, 1881, James Keenan executed a release of the mortgage sought to be foreclosed, and the same was duly filed for record.

Sixth—Upon being informed that such release had been executed, the defendants released of record the mortgage which Geo. W. Keenan had executed on the land they had conveyed to him.

We do not understand the appellee to claim that the defendants, at the time the conveyance was made to them of the mortgaged premises, or at the time they released the mortgage executed to them, had any knowledge that the mortgage sought to be foreclosed had been assigned by James Keenan to the plaintiffs or any one else.

I. Counsel for the appellee insists that the release of the mortgage sought to be foreclosed is a forgery. There is not, however, any such issue made in the pleadings. But, if such was the case, the evidence fails to establish such fact. It was signed and acknowledged by James Keenan, and the most that can be said is that the release was obtained by fraud, of which the defendants had no notice until after they had released the mortgage executed to them by Geo. Keenan.

II. The remaining question is thus stated by counsel for the appellee: "Under the decisions in this state, however, we

concede that the plaintiff's mortgage was fraudulently released, if there was not in fact a forged release; and if such fraudulent release was made before Mary E. Craig purchased, and she was a *bona fide* purchaser after such release, that plaintiff's mortgage could not be foreclosed against her;

* * but no court to our knowledge has gone so far as to hold that the fraudulent release of a mortgage, after the conveyance of the land to another, prevents the foreclosure of the mortgage as against such grantee." It will be seen that the foregoing proposition is made to depend upon the fact that the conveyance to the defendants was made before the release of the mortgage sought to be foreclosed. But it ignores the further fact that such conveyance was not made until after the defendants released their mortgage, and that this was done because of the fact that the mortgage sought to be foreclosed had been released. The defendants, we think, stand in precisely the same condition as if they were holders of a second mortgage on the premises described in the plaintiff's mortgage, and, upon the first mortgage being satisfied of record, they took a conveyance of the premises in satisfaction of their mortgage, and released it of record.

Now, under such circumstances, should the satisfaction of the prior mortgage be set aside, and the same enforced to the prejudice of the defendants? We think not; and that this case in legal effect is precisely like *The Bank of The State of Indiana v. Anderson*, 14 Iowa, 544.

We do not think that the fact, if it be one, that the defendants could have had the satisfaction of their mortgage set aside, is material. Conceding that they could have done so as to Geo. Keenan, for aught we know he may have parted with the land. But, if not, this burden should not be cast on the defendants, who have acted in good faith. The negligence and failure of the plaintiff to have the assignment of the mortgage to her recorded has been the primary cause of this controversy, and we think the burden to have the satisfaction of the defendant's mortgage set aside

 Coyle v. The Chicago, Milwaukee & St. Paul R'y Co.

should have been assumed by her. Possibly this might have been done in a proper action against the proper parties. But what would be the effect, if such had been done, on the rights of those parties, we do not determine, as there is no such question in the record before us.

REVERSED.

 COYLE V. THE CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.

- 62 518
136 417
1. **Railroads: RIGHT TO FENCE TRACK WITHIN TOWN OR CITY LIMITS: LIABILITY FOR INJURY TO STOCK.** A railroad company has the same right to fence its right of way over land which lies within the corporate limits of a city or town, but outside of or beyond streets or alleys or other public highways, as if the corporation did not exist, unless, possibly, such right may be controlled by a municipal ordinance; and where a company fails to fence its track at such a place, it becomes liable to the owner of any stock injured or killed by reason of the want of such fence. Code, § 1289.

Appeal from Jones Circuit Court.

FRIDAY, DECEMBER 14.

ACTION before a justice of the peace to recover double the value of a calf killed by a train on defendant's road, at a place, as claimed by the plaintiff, where the right to fence existed.

By agreement of the parties, the justice made a finding of facts, and rendered judgment for the plaintiff. The defendant sued out of the circuit court a writ of error.

The judgment of the justice was affirmed, and the defendants appeal.

Struble & Kinne, for appellants.

Herrick & Doxsee, for appellee.

SEEVERS, J.—The question we are called on to determine has been certified to us by the trial judge, and is in these

words: "Is it necessary for railroad companies, for the purpose of avoiding the statutory liability for killing stock on the line of its road within the limits of corporate towns, and outside of the first street or alley of said town, to fence same against stock running at large?"

It is provided by statute that "any corporation operating a railway that fails to fence the same against live-stock running at large, at all points where the right to fence exists, shall be liable to the owner of any stock injured or killed by reason of the want of such fence." Code, § 1289.

If the statute is construed literally, railway corporations are liable if they fail to fence at any place, except where the line of the road crosses or encroaches on a highway. But in *Davis v. B. & M. R. R. Co.*, 26 Iowa, 549, it was held that the statute should not be so construed, and it was further held in that case that the right to fence depot grounds did not exist. In *Rogers v. C. & N. W. R. R. Co.*, 26 Iowa, 558, an instruction in these words: "that if the horse was killed in the town plat of Oxford, but not on the depot grounds or within the switches, and not on any street crossing, and the road was not fenced, their verdict should be for the plaintiff for double the value," was held to be erroneous, because "in principle this case is on all fours" with the case first above cited. It is insisted by counsel for the appellant that this case is decisive of that at bar, but we think there are material differences between the two. In the case last cited, the horse got on the track at the "Madison street crossing, ran west along the track one square to Vine street, and was then killed." The question was whether, under the facts above stated, the instruction was correct?

The right to fence clearly did not exist at the place where the horse got on the track, and yet the liability of the defendant was made to depend on the fact that the road was not fenced within the limits of the town, provided the horse was not killed on the depot ground, or within the switches, and not on any street crossing. As applied to the facts in that case, the

ruling made is undoubtedly correct. There is also another distinction between that case and this, which should be mentioned. In the former, the right to fence between the streets of a town or city which are crossed by a railway was involved, while, in the present case, we have the question as to the right to fence outside of or beyond any street or alley, but within the corporate limits. This question has never been determined by this court.

Counsel for the appellant insist that the statute has no reference to incorporated towns, and that it is inoperative except where lands are used for agricultural purposes, where cattle would properly be kept and allowed to run at large. And it is assumed, without evidence to warrant the assumption, we think, that the lands owned by the plaintiff are not used for such purposes. That lands within the limits of an incorporated town may be so used we think is exceedingly probable. But whether this is so or not is, perhaps, not material, because the burden is on the defendant to affirmatively show that the court below erred, and if, therefore, the question to be determined depends upon the fact whether the lands of the plaintiff were not used for agricultural purposes, such fact should either appear in the question propounded to us, or otherwise sufficiently appear from the record.

In addition to the question propounded by the court, the record contains the facts found by the justice. Therefrom we ascertain that the plaintiff was the owner of between five and six acres of ground, which abuts on the defendant's right of way; that land in the locality of plaintiff's, and including his, had not been platted as lots and blocks, but consisted of small tracts of from one and one-fourth to eleven acres in extent; that corn was planted on the plaintiff's land the year in which the calf was killed.

We think, under the circumstances above stated—and it must be assumed that the question propounded to us is asked with reference thereto—that the foregoing question must be answered in the affirmative. Indeed, we go a step further,

Flynn et al. v. The Des Moines & St. Louis R'y Co. et al.

and hold that a railroad has the right to fence within the corporate limits of a town, when such lands extend beyond streets or other highways. That is, such portion of the corporate territory through which a railway runs as lies outside of or beyond streets or other public highways, may be fenced by the railway company along its right of way, to the same extent and in the same manner as if the municipal corporation did not exist, unless, possibly, there is an ordinance of the town which would control such right.

AFFIRMED.

FLYNN V. THE DES MOINES & ST. LOUIS R'Y CO.

1. **Appeal to Supreme Court: SUPERSEDEAS BOND: PENALTY OF: STATUTE CONSTRUED.** Where, in the petition for the foreclosure of a mechanic's lien, a money judgment is asked against the defendants, and such judgment is rendered by the court, the fact that it is also established as a lien upon the property, which amply secures it, and which is ordered sold upon special execution to make the amount of the judgment, does not change its character as a judgment for money, as contemplated in § 3190 of the Code, and under said section a bond to supersede such judgment upon appeal to the supreme court must be for double the amount of the judgment.

Appeal from Polk Circuit Court.

FRIDAY, DECEMBER 14.

THIS is an action for the foreclosure of a mechanic's lien. The circuit court found the amount due the plaintiff to be \$30,110. A judgment was entered against the Des Moines & St. Louis R. R. Co. for that amount, and the same was established as a mechanic's lien upon the railroad of the defendant, and declared to be prior and superior to the liens of the other defendants. The defendant appealed, and, desiring to supersede the judgment and decree, an application was made to the clerk of the circuit court to fix the amount

of the penalty in the supersedeas bond. The clerk fixed it at \$64,000, being double the amount of the judgment, with interest and costs. Thereupon appellants applied to one of the justices of this court to fix the amount of the bond.

A hearing was had, and the penalty in the bond was fixed at \$2,000, with leave to appellee, if he should be so advised, to move the full bench for an increase of the penalty.

That motion, having been made, is now submitted to the court for its determination.

Wright, Cummins & Wright, for the motion.

Parsons & Runnells, contra.

ROTHROCK, J.—The application by appellants to fix the amount of the bond was made to the writer hereof in vacation. It presented a question which was thought to be of sufficient importance to be brought before the full bench, and, as it appeared from the proofs that the property upon which the amount found to be due was established as a lien was amply sufficient in value to secure the appellee for the full amount of their claim, the bond was fixed at \$2,000, with leave to appellee to move for an increase thereof.

The question presented involves the construction of section 3190 of the Code. In reference to the penalty in supersedeas bonds, it provides that, "if the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequence of taking the appeal. But it shall in no case be less than \$100."

To determine whether this is "a judgment for the payment of money" within the meaning of the statute, it is necessary to refer to the petition in the case, and to the judgment or decree which was rendered by the circuit court. The petition demanded a judgment against the Des Moines & St. Louis R. R. Co. for \$28,676.50, and interest, and that the

mechanic's lien of the plaintiff be established against the railroad.

The decree, after finding the amount due the plaintiff, and that the same is a lien prior to the liens of the other defendants, proceeds as follows:

"It is therefore ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendant, the Des Moines & St. Louis R. R. Co., the sum of \$30,110.32, together with the costs of this suit, taxed to \$——."

After declaring the mechanic's lien established on the road, it is further ordered that the property, or so much thereof as is necessary, be sold upon special execution to satisfy the judgment, and that a general execution issue for any sum remaining unpaid after exhausting said property.

Taking this record as a guide to the clerk in fixing the amount of the bond, he finds a judgment for money in proper form. If there were no other or further record entry, the statute is imperative that the penalty of the bond shall be in double the amount of the judgment. It was thought at the hearing at chambers that, because the decree required that the property be exhausted before any general execution should issue, there was some ground for the claim that the judgment was not for the payment of money, within the meaning of the statute. But, upon full consideration of the question, we have arrived at the conclusion that the fact that a judgment for the payment of money is made a lien upon property, does not so qualify it as to take it out of that class of judgments which require a bond in double the amount of the judgment. It is true that, when a judgment for money is declared to be a special lien upon property, and the property is ordered to be sold, this is an incident not common to an ordinary judgment, but it is nevertheless still a judgment for the payment of money.

The construction we adopt is the plain and obvious one required by the statute, and, if we were to depart therefrom, it would require the clerk in all this class of cases, including

 Stafford v. Shortreed.

foreclosures of mortgages, to make an investigation as to the value of the property, in order to fix the amount of the bond. This would lead to unnecessary and profitless contention, by making issues by affidavits before the clerk as to the value of the property. We think that it is better that the plain and unambiguous language of the statute be adhered to.

It is claimed by counsel for the defendant that the statute does not authorize a personal judgment in this class of cases. We do not think it proper to enter upon the consideration of that question in determining this motion. We find that a judgment for the payment of money was demanded in the petition, and such a judgment was rendered by the court. In fixing the amount of the appeal bond, it would be manifestly improper to go behind the record entries to determine questions which pertain to the merits of the case. The motion to require the penalty of the bond to be increased to \$64,000 is

.SUSTAINED.

 STAFFORD V. SHORTREED.

1. **Injunction:** TO RESTRAIN BREACH OF CONTRACT: FACTS NOT WARRANTING. Where defendant sold to plaintiff his business and the good will thereof, and entered into a bond in the penalty of \$100 not to engage in the same business at the same place, *held* that the \$100 was in the nature of stipulated damages for the breach of the bond; that defendant incurred the whole penalty by a single breach; that plaintiff's remedy was exhausted upon the receiving of that amount, and that he was not entitled to an injunction, under § 3386 of the Code, to restrain a continuation of the breach of the contract, notwithstanding defendant was insolvent, so that the penalty of the bond could not be made of him.

Appeal from Allamakee Circuit Court.

FRIDAY, DECEMBER 14.

THIS is an action to recover damages for the breach of a

Stafford v. Shortreed.

bond, and also for an injunction against the defendant, to prohibit him from working at the blacksmithing business in Postville, or within four miles thereof. A temporary injunction was granted, which was dissolved on motion, and plaintiff appeals.

F. S. Burling, for appellant.

S. S. Powers, for appellee.

ROTHROCK, J.—The amount involved in the suit as shown by the pleadings does not exceed \$100, and the case comes to us upon a certificate of the trial judge, of which the following is a copy:

“The following are the facts in said cause: January 4, 1881, plaintiff, G. W. Stafford, purchased of defendant, Thomas Shortreed, his blacksmith tools and stock, and the good will of his business, at Postville, Iowa, for the term of three years, and afterwards executed to plaintiff the following contract:

“‘This is to certify that I have this day sold to G. W. Stafford all of the blacksmith tools in my shop, consisting of anvils, bellows, * * * and all appertaining to my shop, for \$100, and I promise in this sale to obligate myself to do no work at the blacksmith trade, for myself or for wages, for three years, in Postville, or within four miles of Postville, under a penalty of \$100 to be paid to G. W. Stafford, if I do any blacksmithing.

“‘THOMAS SHORTREED.’

“March 17, 1883, an order was made by me that, upon filing a bond in the sum of \$500, a temporary injunction issue. The bond was given and the injunction issued, and it was served April 3, 1883.

“April 27, 1883, and without filing an answer or other pleading, a motion was made in vacation to dissolve the injunction, and taken under advisement. The defendant is insolvent, and commenced working at the blacksmith trade,

in Postville, for himself, about February 27, 1883, without paying the penalty.

"May 5, 1883, at chambers, the motion to dissolve said injunction was sustained, and injunction dissolved.

"Plaintiff excepts.

"I hereby certify, under the foregoing facts, and the petition and amendment thereto, that this case involves the determination of the following questions of law, upon which it is desirable to have the opinion of the supreme court:

"Can plaintiff recover the damages actually sustained already, and have an injunction restraining defendant from continuing to work at the blacksmith trade for himself or for wages?

"Under section 3386 of the Code, where a contract as above given provides for a specified amount as a penalty for the breach of such a contract, and the contract is broken, can the plaintiff recover such penalty, and in the same action enjoin a continuation of such breach?

"C. T. GRANGER, Judge."

We think the court correctly ordered that the injunction be dissolved. The penalty for a breach of the bond was fixed at the sum of \$100. It is to be presumed that the plaintiff made his contract with a full knowledge of defendant's financial standing and ability to discharge his obligation. If he had doubts upon that question, he should have required some security to protect himself against any damages which he might sustain by reason of the defendant's failure to observe his agreement. As he took the defendant's promise to pay him \$100 if defendant should violate his agreement, he cannot ask more than the ordinary process of the law to enforce payment. The amount which the defendant agreed to pay is in the nature of stipulated damages. It cannot be regarded as a penalty, because the actual damages which plaintiff may sustain by a violation of the agreement must, in the nature of things, be the subject of mere conjecture. They cannot be established by evidence, even

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approximately. Section 3386 of the Code has no application to a case like this. It is therein provided that in "all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action by ordinary proceedings, he may in the same cause pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury. * * *

In this case there can be no repetition or continuance of a breach of the contract, because, when the defendant commenced to work at blacksmithing at Postville, he incurred the whole liability, which was to pay the plaintiff \$100.

AFFIRMED.

CURRIER V. BATES.

1. **Partnership:** APPROPRIATION OF FIRM PROPERTY BY PARTNER: LIABILITY TO COPARTNER. Where a partner with the assent of his copartner appropriates firm property to the payment of his individual debts, he will, notwithstanding such assent, be held to account to his copartner for the property so appropriated.

Appeal from Adams Circuit Court.

FRIDAY, DECEMBER 14.

ACTION in chancery to settle the business of a copartnership, and to recover an amount due plaintiff, one of the partners, which he alleges is in the hands of defendant, his copartner. The cause was sent to a referee, and upon his report a decree was entered for the value of the assets of the firm found to be in defendant's hands. Defendant appeals.

Frank M. Davis and *Anderson & Towner*, for appellant.

Thomas L. Maxwell, for appellee.

BECK, J.—I. The evidence establishes the following facts:

Plaintiff and defendant entered into a copartnership for the purpose of buying and shipping grain. The business was mainly done by defendant. The grain was purchased in the name of the firm, but the shipments were made all in the name of defendant, and the remittances for grain sold were made to him and in his name. A number of shipments were made in this way to dealers in Chicago, with whom defendant, before the formation of the partnership, had business transactions of the same character on his own account. It is probable that these dealers knew of the existence of the partnership between plaintiff and defendant, but there is no evidence tending to show that they knew that the grain shipped them in defendant's name belonged to the firm. Upon transactions connected with option deals, there was a balance due from defendant to them, and the proceeds of certain car loads of grain bought by the firm and shipped to them in defendant's name they credited to the account of defendant in payment of the transactions in options. Defendant denies indebtedness to the Chicago dealers, which is not established by the evidence before us. The evidence shows that plaintiff knew of the manner in which defendant conducted the business, but did not assent to the shipments in defendant's name, and remittances to him individually.

II. It cannot be doubted that, if defendant appropriated the grain belonging to the firm, or the proceeds thereof, he is liable to be charged therefor. We think the evidence sufficiently establishes such an appropriation of the firm property—the grain, or its proceeds, which remains unaccounted for, and is claimed to have been credited to defendant by the Chicago dealers. The facts upon which we base this conclusion are these: Defendant shipped the grain in his own name in the same manner as prior shipments to the same dealers, and in the same way secured remittances from them. He did not advise the consignees that it was firm property. No other act was required to induce the belief on the part of the consignees that the grain belonged to

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defendant. The knowledge of plaintiff of the manner the business was conducted, without objection thereto, would amount to assent to the appropriation by defendant. But such assent does not defeat the plaintiff's right to recover his interest in the property. Now, although defendant in fact was not indebted to the Chicago dealers, the appropriation was nevertheless made.

We think the facts present a clear case of the appropriation of the property of the firm by defendant. Upon this ground, we think the judgment of the circuit court ought to be

AFFIRMED.

GILL V. SULLIVAN ET AL.

MULDOWNEY V. THE SAME.

WALSH V. THE SAME.

1. Supersedeas Bond: RECOVERY ON LIMITED BY TERMS OF BOND.

In an action upon a supersedeas bond, the recovery must be limited by the terms of the bond. Accordingly, where in a certain action the plaintiff herein was decreed to be entitled to the possession of certain real estate, and the defendants appealed to the supreme court, and filed a bond, which was regarded by all the parties as a supersedeas bond, but which did not obligate the appellants in that case to pay "all rents and damages to property during the pendency of the appeal, out of which the appellee is kept by reason of the appeal," (Code, § 3186,) *held* that the bond did not in fact supersede the judgment, and that, after an affirmance of the cause in the supreme court, plaintiff could not recover upon the bond for rents and damages to the real estate during the pendency of the appeal.

62	529
120	716

Appeal from Iowa District Court.

FRIDAY, DECEMBER 14.

THESE are actions upon a supersedeas bond given in actions appealed to this court. A demurrer to the petition in each

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case was sustained, and judgment thereon was rendered for defendants. Plaintiffs appeal. The cases, involving the same facts, were submitted upon one abstract.

F. P. Murphy, for appellants.

Rumple & Lake, for appellees.

BECK, J.—I. In an action in the circuit court, the plaintiffs were held to be the owners of certain real estate, and from the decision the defendants appealed to this court, and filed in the respective actions the supersedeas bonds upon which these suits are brought. The judgments were affirmed in this court. These facts are alleged in the petition, which claims to recover for the rents and profits of the real estate, and damages for injury done thereto. The bonds are conditioned that “appellants shall pay to the appellees all costs and damages that shall be adjudged against appellants on said appeal, and shall also satisfy and perform the said judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the circuit court.” The demurrers to the petitions, were sustained by the court, upon the ground that the defendants are not, by the terms of the bonds, liable for rents of and injury to the property.

II. We think the demurrers were rightly sustained. The damages which plaintiffs claim in these actions do not arise upon a breach of any condition of the bonds creating liabilities for rents and profits and for injury to the lands. Under the statute, the bonds, in order to supersede the judgments, should have contained such condition. Code, § 3186. By its omission, the bonds did not lawfully operate to supersede the judgments. The contracts of the parties were expressed in the bonds, and they cannot be extended on the ground that they were mistakenly regarded as superseding the judgments.

III. The section of the Code above cited prescribes that a supersedeas bond shall be "to the effect that the appellant shall pay to the appellee all costs and damages that shall be adjudged against the appellant on the appeal; also that he shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the inferior court, not exceeding in amount the value of the original judgment or order, and all rents and damages to property during the pendency of the appeal, out of which the appellee is kept by reason of the appeal."

Counsel for plaintiffs insist that the last clause of this provision, beginning with the words "not exceeding the amount," to the end of the quotation, is a limitation upon the amount which the obligee may recover, and is not intended to express a condition of the bond. This is a mistaken construction. The language quoted prescribes the conditions of the bond, one of which is to the effect that the obligor shall be liable for rents and injury to the property, possession of which is held pending the appeal. The limitation upon the recovery expressed by the words, "not exceeding in amount or value the original judgment," etc., is a part of the condition, and does not extend to rents of and injury to property. These words do not qualify those following them; they limit those preceding them.

As the bonds contain no contract binding defendants for rents and injury to the property, they cannot be held liable therefor in this action.

The judgment of the circuit court is

AFFIRMED.

62	532
82	284
62	532
89	345
62	532
106	520

FETES V. O'LAUGHLIN ET AL.

1. **Mortgage: OMISSION TO STATE AMOUNT OF NOTE SECURED THEREBY**
EFFECT OF: NOTICE. All written instruments referred to in deeds and contracts, with sufficient explicitness to identify them, are to be regarded as so far constituting a part of such deeds and contracts as to be read with them in order to determine their terms and conditions. Accordingly, where a mortgage failed to recite the amount of the note secured thereby, but referred to the note by its date, the names of the maker and payee, the date of its maturity, the rate of interest provided for and the time it became payable, *held* that this was sufficient to identify the note, and that the recording of the mortgage gave notice to a subsequent mortgagee of the existence of the lien and the amount thereof. See authorities collated by Beck, J.

Appeal from Washington Circuit Court.

FRIDAY, DECEMBER 14.

ACTION in chancery to foreclose a mortgage. There was a decree granting the relief prayed for by plaintiff. The defendant, Scofield, alone appeals. The facts of the case appear in the opinion.

H. & W. Scofield, for appellant.

J. F. Brown and A. H. Patterson & Sons, for appellees.

BECK, J.—I. The controversy in the case arises between defendant, H. Scofield, who claims title to the land under foreclosure of a junior mortgage, and the plaintiff and the other defendants. The mortgage which plaintiff seeks to foreclose was duly recorded prior to the mortgage under which Scofield claims title, and is sufficient in all respects, unless it be invalid upon the ground that it omits to recite the amount of the note which it is given to secure. The omission occurs in the manner shown by the following quotations from the mortgage. After the granting part of the mortgage, its condition is expressed in the following lan-

guage: "The foregoing conveyance is on the conditions following, to wit: The said William O'Laughlin has executed and delivered to the said Peter Fetes his promissory note for the sum of ——— dollars, dated the twenty-sixth day of June, 1876, payable two years after date, with ten per cent interest, payable annually. Now, if the said William O'Laughlin shall well and truly pay to said Peter Fetes, or his assignees, the full amount of said note above specified as the same becomes due, then the above to be void, otherwise to be and remain in full force." The mortgage recites the consideration of the conveyance to be \$350.

II. The defendant, Scofield, insists that the registry of the mortgage, on account of its omission to show the amount of the note, did not impart notice to him as a claimant under the junior mortgage. This position presents the only question that need be determined in the case.

The defect in the mortgage consists in the omission, through mistake probably, to state the amount of the promissory note secured by the conveyance. If such omission does not affect the validity of the instrument, the fact that it occurred through mistake cannot, of course, defeat the instrument.

A mortgage given as security for the payment of money operates to secure the debt contemplated by the parties, and will remain valid as long as the debt remains unpaid. This is so, even if there be changes in the note given by the debtor to the creditor, by the cancellation of the note first given and the execution of a new one. So the mortgage will secure the increase of the debt by interest. As long as the debt remains unpaid, the mortgage is valid. The amount of the debt need not be shown upon the face of the mortgage, if reference be made to other evidence thereof from which the true amount of the debt may be determined. Were the rule otherwise, the increase of the debt by interest, or its diminution by payments, would affect the validity of the instrument. The true amount of the debt secured can-

not always be discovered from the mortgage, however accurately the note may be described therein. But if there be such a reference to the note and the party executing it as will direct inquiry which will lead to the discovery of the amount of the debt, the mortgage is regarded as valid.

It is a familiar rule of the law that all written instruments referred to in deeds and contracts, with sufficient explicitness to identify them, are to be regarded as so far constituting a part of such deeds and contracts as to be read with them, in order to determine their terms and conditions. In the case before us, the note secured by the mortgage is referred to by its date, the name of the maker, the day of its maturity, the rate of interest provided for, and the time it becomes payable. Surely this reference is sufficient to identify the note and authorize it to be read in order to determine the terms of the mortgage. The record of the mortgage imparted notice to defendant that the amount of the note was to be determined by that instrument itself, to which reference was made. These conclusions are supported by the following cases: *Kellogg v. Frazier*, 40 Iowa, 502; *Clark v. Hyman*, 55 Id., 14; *Burne v. Littlefield*, 29 Me., 302; *Ricketson v. Richardson*, 19 Cal., 330; *Gill v. Pinney's Adm'r*, 12 Ohio St., 38; *Tousley v. Tousley*, 5 Id., 78; *Hurd v. Robinson*, 11 Id., 232; *Babcock v. Lisk*, 57 Ill., 327; *Booth v. Barnum*, 9 Conn., 286; *Stoughton v. Pasco*, 5 Id., 442; s. c., 13 Am. Decisions, p. 72. See also *Michigan Ins. Co. v. Brown*, 11 Mich., 266, and *Webb v. Stone*, 24 N. H., 282.

III. The following cases cited by counsel for defendant fail to support their position that the omission of the amount of the note in the mortgage invalidates it.

In *Disque v. Wright*, 49 Iowa, 538, the name of the mortgagee was omitted from the mortgage. In *Frost v. Beekman*, 1 Johns. Ch., 288, the mortgage as registered showed the debt to be \$300 instead of \$3,000, the true amount. It was held to be notice to a subsequent purchaser of indebtedness to the extent of \$300, and no more. *Herman v. Dem-*

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ing, 44 Conn., 124, relates to the sufficiency of the description of the mortgaged premises. The mortgage in *Chauncy v. Arnold*, 24 N. Y., 330, as in *Disque v. Wright*, *supra*, did not contain the name of the mortgagee. In *Whittaker v. Fuller*, 5 Minn., 508, it is held that the interest prescribed by statute should be allowed upon the debt secured by the mortgage, when the instrument did not specify a higher rate named in the notes. The case is in conflict with the decisions above cited, and especially with *Ricketson v. Richardson*, *supra*. The facts upon which *Truscott et al. v. King*, 6 N. Y., (2 Sel.), 147 and *Peck, Adm'r, v. Mallams*, 10 N. Y., 509, were decided, distinguish these decisions from the case at bar.

It is our conclusion that the record of the mortgage in this case imparted notice of the amount of the debt for which it was given as security, and that it is a lien prior to the mortgage under which defendant claims title to the land.

AFFIRMED.

 CRAY V. CURRIER ET AL.

1. **Chattel Mortgage:** INSUFFICIENT DESCRIPTION. A chattel mortgage which describes the mortgaged property as "all the cut and growing and having grown" on the land described, is insufficient to convey to third parties notice of a lien created thereby upon the crops grown upon the land.

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 1115 447

Appeal from Buchanan Circuit Court.

FRIDAY, DECEMBER 14.

ACTION in replevin brought to recover possession of certain hay, oats and corn. The plaintiff claims the right of possession by virtue of a chattel mortgage. The defendants claim the right of possession under the levy of an execution issued upon a judgment against the mortgagor. There was a trial

to a jury, and verdict and judgment were rendered for the defendants. The plaintiff appeals.

D. W. Bruckart and E. E. Hasner, for appellant.

Holman & Crawford, for appellee.

ADAMS, J.—The court gave the jury a peremptory instruction to render a verdict for the defendants. In this we think that there was no error. The mortgage under which the plaintiff claims is defective in the description. It is in these words: "All the cut and growing and having grown on the W $\frac{1}{2}$ of the N E $\frac{1}{4}$," etc. The plaintiff contends that, while the description is not precisely as it should be, it is not unintelligible, nor, when properly construed, uncertain, but that it means all the *crops* cut, growing and grown on the land.

It is evident enough upon looking at the description that a word of some kind was omitted by mistake. If we could discover with reasonable certainty what the word is, we might feel justified in supplying it by construction. But we are not able to discover with any certainty what word was intended. We know of no rule which would justify us in holding that the word omitted is the word of the broadest signification which could be properly used in connection with the other words. We cannot say why we should supply the word *crops*, rather than *hay*, or *corn*, or something else. In our opinion the description is fatally defective.

AFFIRMED.

THOMAS, ASSIGNEE, v. STETSON.

68 537
78 619**1. Partnership: PAYMENT OF PARTNER'S DEBTS WITH FIRM PROPERTY.**

Where a member of a co-partnership is indebted to a person owing the firm, he cannot apply the indebtedness to the firm for the purpose of canceling his personal indebtedness to the firm's debtor, without the consent of his co-partner, or his subsequent ratification; and such adjustment will not avail the debtor to the firm as a defense in an action by the assignee of the firm to recover the amount of the indebtedness. See authorities collated by ADAMS, J.

Appeal from Buena Vista District Court.

FRIDAY, DECEMBER 14.

ACTION upon an account for goods sold and delivered. The defendant for answer averred certain facts as constituting payment. The plaintiff demurred to the answer upon the ground that the facts averred did not constitute payment. The court sustained the demurrer, and the defendant electing to stand upon his answer, judgment was rendered for the plaintiff. The defendant appeals.

Gregory & Bailie, for appellant.

Lot Thomas, for himself.

ADAMS, J.—The facts as shown by the answer are, that the goods in question were purchased by the defendant of one J. F. Doty & Co., the plaintiff's assignor; that this firm consisted of J. F. Doty and James R. Day, and was engaged in selling lumber and coal at Storm Lake; that Doty resided at Storm Lake, and was the active member of the firm, and had the entire and exclusive management and control of the business; that Day resided in Dubuque; that the sale by J. F. Doty & Co. to the defendant of the goods in question was made through Doty as a member of the firm; that the defendant was a merchant at Storm Lake, engaged in a different line of trade, and sold goods in his line on credit to Doty for his

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individual use, and afterward Doty and the defendant made a settlement, whereby it was agreed that the indebtedness due to J. F. Doty & Co. from the defendant should be deemed paid by the release of the indebtedness due from J. F. Doty individually to the defendant. This alleged settlement constitutes the payment upon which the defendant relies. For the purpose of showing that J. F. Doty had authority to accept in payment of indebtedness due his firm the release of certain indebtedness due individually from himself, the defendants made certain averments, which are, in substance, that for two years or more he had bought goods on credit of J. F. Doty & Co., and had sold goods on credit to J. F. Doty for his individual use, and that he and Doty had afterwards applied one account against the other, and J. F. Doty had charged himself accordingly on the firm books of J. F. Doty & Co., and that Day did not object thereto. He further averred, in substance, that it was the uniform practice and usage of the firm of Doty & Co. at all times to receive accounts against Doty individually in payment of their partnership demands, which was well known throughout the community, so that this defendant knew such to be their uniform practice prior to the time that he dealt with the firm, and that, in dealing with it and making settlements with Doty as set out, he relied upon such practice.

These are, in substance, the averments upon which the defendant relies as showing payment, but in our opinion they do not have that effect. A partner has authority to bind the firm in all matters pertaining to the partnership business. But it is not properly partnership business to release indebtedness due to it, in consideration of the release of indebtedness due to its debtor from one of its members. The precise question arose in *McNair v. Platt*, 46 Ill., 211. In that case the court said: "The rule is firmly established, and not to be controverted, that, where a member of a copartnership is indebted to a person owing the firm, he cannot apply the indebtedness due to the firm for the purpose of canceling his

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indebtedness, nor can he apply the funds or property of the firm for such purpose without the consent of his copartner, or at least his subsequent ratification." Citing *Brewster v. Mott*, 4 Scam., 378, and *Hilliard v. Walker*, 11 Ill., 644. See also 1 Dev. & Bat. Eq., 284; *Weed v. Richardson*, 2 Dev. & Bat. Law, 535; *Pierce v. Pass*, 1 Port., (Ala.) 232; *Caldwell v. Scott*, 54 N. H., 414; *Todd v. Lorah*, 75 Pa. St., 155; *Everingham v. Ensworth*, 7 Wend., 326; *Dob v. Halsey*, 16 Johns., 34; *Viles v. Bangs*, 36 Wis., 135. Possibly it may be thought that a different rule is held in *Stokes v. Stevens*, 40 Cal., 391. We are inclined to think that that case is distinguishable from the one at bar; but, whether it is so or not, we have to say that it appears to us that the ruling of the court below is sustained by a great preponderance of authority. It may be that, if the release of the firm account against the defendant, for a consideration moving to Doty, was previously authorized or subsequently assented to by Day, the other member of the firm, the transaction should be deemed to be that of the firm, and valid, if made in good faith, even as against its creditors. The defendant insists that he pleaded such authorization. But it appears to us that what he relies upon as averments of authorization are at most only averments of facts proper to be proven as evidence tending to show authorization. He avers that previously settlements of a similar kind had been made between him and Doty, and entered upon the firm books, and that Day did not object. But this would not be even a circumstance against the defendant, unless Day knew what the books contained, or otherwise had knowledge of what had been done. The defendant further avers that it was the uniform practice of the firm to receive accounts against Doty in payment of accounts due the firm, which fact was known to the defendant and relied upon by him when he sold on credit to Doty. But this averment by the defendant must be taken in connection with another, and that is, that Doty "had the entire and exclusive management and control of the business of the firm." The

firm, then, did no business except what Doty did, and had no practice except what grew out of Doty's acts. Besides, the "practice" upon which he says he relied would, as already said, if it had been the practice of the firm, only be a circumstance to be shown in evidence for what it was worth. The defendant should have expressly averred authorization, if he relied upon any authorization as distinct from that implied from the fact of partnership.

He insists that it is a great hardship if his settlement with Doty cannot be sustained. But he knew, or should have known, that his transaction with Doty was not within the scope of the firm business, and, unless sanctioned by Day, was a misappropriation by Doty of firm assets. When a person enters into such a transaction with a member of a co-partnership, it appears to us that we are justified in saying that it is his duty to see whether or not what appears to be a wrong on its face is so in fact. We think that the demurrer to the defendant's answer was properly sustained.

AFFIRMED.

BUSHNELL ET AL. V. ROBESON & Co. ET AL.

1. **Nuisances: SLAUGHTER-HOUSES IN CERTAIN LOCATIONS ARE PRIMA FACIE.** A slaughter-house in a city or public place, or near a highway, or where numerous persons reside, is *prima facie* a nuisance. It is accordingly *held* that the slaughter-house of defendants, situated as it is shown to be by the evidence, must be regarded as a nuisance.
2. ———: **ACTION TO ENJOIN: PARTIES PLAINTIFF: JOINDER.** Although a nuisance may affect the public at large, yet where an individual suffers special injury therefrom, he is entitled to sue for relief; and several individuals so specially injured in the enjoyment of their homes may join in an action for the abatement of the nuisance, notwithstanding they severally own the property on which they reside.
3. ———: **REMEDY BY INJUNCTION IN EQUITY: STATUTES CONSTRUED.** Inasmuch as courts of equity, prior to the adoption of the Code of 1873, had jurisdiction to restrain by injunction the continuance of nuisances, that jurisdiction still exists, (Code, § § 2508, 3386,) notwithstanding a remedy by action at law is provided by section 3331 of the Code.

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4. ———: **PRIOR ESTABLISHMENT OF: USE OF ADJACENT LAND NOT PREJUDICED BY.** One person cannot erect a nuisance upon his land adjoining vacant land owned by another, and thus measurably control the use to which his neighbor's land may in the future be subjected; and the fact that the nuisance in this case complained of was erected prior to the time when plaintiffs built their residences upon the neighboring lots, is no reason why a court of equity should remit them to a court of law for their remedy.
5. **Practice: PETITION NOT SUFFICIENTLY SPECIFIC: EFFECT ON EVIDENCE.** A petition in equity, filed by several property owners, to abate a nuisance affecting their property, but which fails to state whether the plaintiffs jointly or severally own the property affected, may be vulnerable to a motion for a more specific statement; but defendants, failing to make such motion, cannot on the trial object to evidence tending to show the character and extent of plaintiffs' interest in the property.
6. **Nuisance: ABATEMENT IN EQUITY: CONDITIONAL OR UNCONDITIONAL DECREE: PRACTICE.** Where a court finds an establishment (a slaughter-house in this case) to be a nuisance as conducted, it should allow the defendants to show, if they can, that it is possible to continue the business in the same place without its being a nuisance. If this can be done, the court should by its decree determine the conditions upon which the business may be continued; otherwise the decree should unconditionally enjoin the further operation of the establishment.

Appeal from Scott Circuit Court.

FRIDAY, DECEMBER 14.

THE petition states that the defendants are the owners of a slaughter-house, which is situated near the limits of the city of Davenport, and near one of the suburbs thereof, in which the plaintiffs reside. "That at said slaughter-house large numbers of cattle, sheep and hogs are confined in small enclosures or pens, where they are fed and watered, and the excrement, decayed food, slop and other filth, retained and allowed to decay; that said cattle, sheep and hogs are at said place killed and slaughtered and dressed and prepared for market, and the excrement and useless parts of said cattle, sheep and hogs are retained and allowed to decay on said premises, and the tallow, lard, fat, etc., from said animals is melted down and separated from other matter at said premises, and other work and labor, such as is usually carried on and conducted at such

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places and in that business, is there carried on and conducted." That there is no adequate drainage on said premises, and, "by reason of the aforesaid matters, said slaughter-house, yards and pens cause and occasion noxious exhalations and offensive smells, greatly corrupting and infecting the air in said vicinity and neighborhood, and other annoyances dangerous and injurious to the health, comfort and property of plaintiffs, and others residing in said vicinity, and offensive to the senses, and an obstruction to the free use of said property, so that the same essentially interferes with the comfortable enjoyment of life and property in said neighborhood, and is a nuisance."

The relief asked is that "said slaughter-house, yards, pens, etc., be declared and decreed to be a nuisance, and that said defendants and their agents, employes, and any and all persons acting or claiming under them, may be forever enjoined and restrained from further carrying on or conducting said business at said place, and that a writ of injunction may be issued."

Certain paragraphs of the petition were stricken out on motion, and the answer generally and specially denied most of the material allegations of the petition. The court found for the plaintiffs, and entered a decree enjoining the defendants from continuing said business on the premises in "any such way or manner as to cause a repetition or continuance of the nuisance." Both parties appeal, but the plaintiffs did not do so until after the defendants had appealed.

Davison & Lane, for appellants.

Bills & Block, for appellees.

SEEVERS, J.—I. We have examined the evidence, and have reached the conclusion that the allegations of the petition are sustained by a preponderance of the evidence. The plaintiffs introduced thirty witnesses, and the defendants forty-three. The evidence is lengthy. It is fully set forth in the abstract—about one hundred and fifty-five pages being required for

1. NUISANCES:
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that purpose. It is obvious that we cannot and should not occupy the space in the reports which would be required to comment largely on this evidence. It is directed to the single point whether the stench from the slaughter-house and pens is injurious to health, and interferes with the comfortable enjoyment of life and property. Code, § 3331.

The evidence on the part of the plaintiffs is affirmative in character, while that introduced by defendants is necessarily negative.

But the evidence introduced by the plaintiffs is sustained by some of the witnesses introduced by the defendants. Some of the witnesses of the latter, while admitting that there were smells emanating from the slaughter-house, say that they suffered no inconvenience therefrom, and others say there were offensive odors at times, and that they would not like to live within the range thereof if they existed all the time.

We cannot disregard or fail to give due weight to the plaintiffs' witnesses, who testify affirmatively that there are odors emanating from the defendants' premises, which are injurious to health, and render the comfortable enjoyment of property impossible.

It appears from the evidence that cattle, sheep and hogs are slaughtered on the premises, and the refuse thereof, consisting of the heads, feet and entrails, are usually boiled in a kettle and fed to the hogs. The entrails of lambs have been so fed without being cooked. Tainted meat and tallow also have been rendered or cooked on said premises on at least two occasions.

From some of these sources, and from the pens, we are forced to the conclusion that there emanate odors and smells which are injurious to health and the comfortable enjoyment of property.

We are not prepared to say that the premises are not kept as clean as the business carried on will permit. Nevertheless, we think such business, while necessary and essential, when carried on at the place it is, must be regarded as a nuisance.

Slaughter-houses in a city or public place, or near a highway, or where numerous persons reside, are *prima facie* nuisances. Wood's Law of Nuisances, § § 504, 505; *Catlin v. Valentine*, 9 Paige, Ch., 575; *The State v. Kaster*, 35 Iowa, 221.

The defendants' slaughter-house is about seven hundred feet north of the limits of the city of Davenport. But west of the house is Grant's addition, about five hundred feet distant.

Between the defendants' premises and said addition there is a public highway, known as the Dubuque road, which connects with or is an extension of Brady street in said city.

Robinson & Ballew's addition is north of the slaughter-house, and about seven hundred feet distant. South avenue is a public highway, and is the southern boundary of said addition.

Defendant's premises abut on Farnam street on the east, which is about eight hundred feet from the slaughter-house. The city engineer testifies that "the character of the neighborhood where defendants' slaughter-house is is for residences." Grant's addition is laid off in lots and blocks, and there are fifteen or more residences thereon, some of which are directly across the Dubuque road from the premises of the defendants, and others immediately across said road, but on an angle therefrom.

Robinson & Ballew's addition was, as we believe, originally laid off into ten-acre lots, but a portion of it has been subdivided into smaller tracts. It is occupied as residences, and some, at least, of the residents are engaged in gardening. Across Farnum street, directly east and northeast of the defendants' premises, are two residences.

From this brief and possibly imperfect statement, it will be seen that the slaughter-house is practically surrounded by residences that are, at most, not more than five hundred to one thousand feet distant. We feel constrained to say that, situated as the slaughter-house and pens are, and the business

there conducted, they are and must, under the evidence, be regarded as a nuisance.

II. But counsel for the defendants insist that, as there are four or more plaintiffs, the injury suffered by them must be separate and distinct from that suffered by the public, and if this does not appear the plaintiff; are not entitled to the relief asked. A nuisance may be both public and private. *Park v. The C. & S. W. R. R. Co.*, 43 Iowa, 636. That is to say, a nuisance may affect the public, and yet an individual may be injuriously affected in such capacity as to be distinguished from the public at large. When this is the case, he is entitled to relief. Now, in the case at bar, the plaintiffs, because of the location of their residences, as we find, have suffered damages as distinguished from the public at large. This is apparent from the evidence; for, conceding the nuisance to be public, the plaintiffs have suffered private damages, because several of the defendants' witnesses testified that they did not suffer any damage, although they reside in the neighborhood. Nor were the plaintiffs at all times inconvenienced thereby, but only at times, or possibly when the wind was from certain directions. At times one person suffered and at other times others. This being so, the whole public or neighborhood were not equally affected, and some persons seem to have suffered no inconvenience whatever.

We think the objection to plaintiffs' recovery under consideration is not well founded. Although the plaintiffs separately own the property on which they reside, we are of the opinion that they can unite in asking the relief sought. *Robinson v. Baugh*, 31 Mich., 290; *Brandirff v. Harrison Co.*, 50 Iowa, 164; *Robbins v. S. C. Turnpike Co.*, 34 Ind., 461; *Trustees v. Cowen*, 4 Paige, 510; High on Injunctions, 1st edition, §. 748.

III. Counsel for the appellants insist that plaintiffs have a plain, speedy and adequate remedy at law, and therefore are

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3. —: remedy by injunction in equity: statutes construed.

not entitled to relief in equity; because it is provided by statute that an action at law may be brought by any one who is injured by a nuisance, and in which action the nuisance may be enjoined or abated. Code, § 3331.

This question was somewhat considered, but not determined, in *Daniels et al. v. Keokuk Water Works*, 61 Iowa, 549. In that case it was said that, under a similar statute, it had been so held in Wisconsin. *Remington v. Foster*, 42 Wis., 608. In the cited case, the court so held on the ground that the statute "abrogated the equitable remedy" theretofore existing, and substituted the legal.

But, as was said in that case, there is no doubt that the equitable remedy at one time existed in that state. It will not be doubted, we apprehend, that this is true as to this state. The question, then, is whether such equitable remedy has been abrogated. In addition to the foregoing statute, there is another which provides that "an injunction may be obtained as an independent remedy in an action by equitable proceedings, in all cases where such relief would have been granted in equity previous to the adoption of this Code * * *;" (Code, § 3386;) and "the plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity before the adoption of this Code had jurisdiction * * *." Code, § 2508.

Under the foregoing statute, the remedy in equity, which, prior to the adoption of the Code, was freely administered, continues to exist because of the express terms of the statute. The several statutes must be construed together, and, this being done, there has been added to the legal remedy, which has existed for more than a hundred years, the provision that an injunction might issue, and thus make the legal remedy more effectual. A plaintiff may pursue either. This view is recognized, at least, in *Ewell v. Greenwood*, 26 Iowa, 377. It is, however, doubtful whether the point now made by counsel was directly presented in the case cited. But

the court must, it seems to us, have considered and necessarily determined the question under consideration. Counsel for the appellants maintain that section 3386 of the Code only applies to cases where the nuisance is about to be erected. But we are unable to concur in this view. No such distinction was recognized in courts of equity before the adoption of the Code.

The courts of equity granted relief as readily and certainly, in a proper case, where the nuisance had been erected, as where it was about to be. If it had been intended to make the statute under consideration applicable to the latter class only, we think apt words would have been used to express such intent. Because, therefore, of the existence of the statute, continuing in force the equitable remedy, we think the Wisconsin case above cited is distinguishable.

IV. The slaughter-house was erected, and the grounds on which it is situated were used substantially as now, when some of the plaintiffs, at least, and perhaps all of them, purchased their property and erected their residences. We do not understand counsel for the appellants to claim that this fact makes any difference, except in so far as it affects the discretion usually, and possibly always, reposed in a court of equity, to grant or refuse an injunction, and remit the parties to their remedy at law for the recovery of damages.

Possibly, if nothing else was involved but damages to property, the point made would be well taken. But when, as in this case, health is injuriously affected and personal discomfort incurred because of offensive odors, adequate compensation in damages cannot be obtained. In such a case, if this action had been at law, the only adequate remedy that could have been granted would have been the abatement of the nuisance. As equity has concurrent jurisdiction with law, we do not think the sound discretion vested in the former should be so exercised as to deny any and all relief, and remit the plaintiffs to the remedy at law for the recovery of inadequate dam-

4. —: prior
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ment of : use
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ages and the abatement of the nuisance. The plaintiffs do not ask the former, and the latter may be administered in and by either jurisdiction. Besides this, one person "cannot erect a nuisance upon his land adjoining vacant lands owned by another, and thus measurably control the use to which his neighbor's land may in the future be subjected." *Campbell v. Seaman*, 63 New York, 568; *Ashbrook v. Commonwealth*, 1 Bush, 139.

In this last case, pens in which were kept large numbers of cattle, horses and hogs were declared to be a nuisance, although they had been erected and so used for thirty years, and, when erected, were outside of the limits of the city of Covington, but by reason of the increase of population the pens became a nuisance. See also *McKeon v. See*, 51 N. Y., 300; *Brady v. Weeks*, 3 Barb., 157.

There is no allegation in the petition that plaintiffs own the property in which they live, nor is the location, character or value thereof stated. Because of this fact, the defendants objected to the admission of any evidence tending to show ownership, or the character and extent of the plaintiffs' property, and, therefore, it is said that a separate and distinct interest has not been shown, if the evidence aforesaid was inadmissible.

The petition was not attacked by either motion or demurrer, and we think it was too late to raise the objection when it was sought to introduce the evidence. The petition on its face stated a cause of action, because it did not appear therefrom that the interest of the plaintiffs was separate and distinct. From the petition it cannot be ascertained whether the plaintiffs owned the property jointly or severally. So far, therefore, as the injury to property was concerned, the petition stated a cause of action. Of course, the injury to health and personal comfort was separate and distinct. But the objection urged only relates to the property, and we think a motion for a more specific statement was the only remedy the defendants had. This, for sufficient reasons, no doubt, they

5. PRACTICE:
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did not see proper to make. We have not considered the evidence of Hans Enfeldt, and therefore it is unnecessary to determine whether the objection made to its admission is well taken or not.

V. As to the plaintiffs' appeal, as has been stated, two paragraphs of the petition were stricken out on motion, and in this, it is said, the court erred. Conceding this, we think the plaintiffs have not been prejudiced by the ruling of the court.

VI. The decree enjoins the defendants from continuing the nuisance on the premises, or in the immediate vicinity thereof, *"in any such way or manner as to cause the repetition or continuance of said nuisance."*

6. NUISANCE:
abatement in
equity: con-
ditional or
unconditional
decree:
practice.

The plaintiffs insist that the italicized words should be stricken out of the decree. If this is done, the slaughtering of cattle, hogs and sheep cannot be carried on on said premises. The argument in favor of thus changing the effect of the decree is that, as it now stands, nothing is settled; that the question is certain hereafter to arise whether the business as conducted in the future constitutes a nuisance, although a few slight changes are made; and that further litigation is inevitable, unless the plaintiffs submit to the continuance of that which we hold to be a nuisance. There is much force in this argument; for we think it should be presumed that a suitable place, possibly not so convenient, could be found, where the business could be conducted without being a nuisance. It is a well known fact that slaughter-houses are in existence in or near cities, which are not regarded as nuisances. The city of Davenport, situate as it is on the banks of the Mississippi, cannot constitute an exception. If the italicized words were stricken out, the defendants could not conduct said business on the premises. If this can be avoided with due regard to the rights of others, we think it should be done. The circuit court, we infer, thought that it could. We are impressed with the belief that the case was not tried on any such theory. The defendants de-

nied the existence of the nuisance, and no evidence was introduced upon the question whether the business could be so conducted that it would not be a nuisance, if changes were made.

We are disposed to think the defendants should have the opportunity of so showing, if they can, and see proper to do so. But the plaintiffs should not be required to resort to another action to obtain rights to which we hold they are justly entitled. We think the desired end can be best accomplished by remanding the cause to the circuit court, with directions to permit the defendants, within such reasonable time as the court may direct, to introduce further evidence upon the question as to whether the manner of conducting said business can be so changed as to prevent the same from being a nuisance; the plaintiffs to have the opportunity of offering evidence in rebuttal of that introduced by the defendants. If the defendants decline to introduce any additional evidence, or if they do so, and the court is unable therefrom to determine that the said business can be so conducted as not to be a nuisance, then the court is directed to enter a decree unconditionally enjoining its continuance; but if the court should find otherwise, then a decree should be entered defining and protecting the rights of the parties. On defendants' appeal the decree is affirmed, and on plaintiffs' appeal

MODIFIED AND AFFIRMED.

COX V. CURRIER, SHERIFF, ET AL.

1. **Execution : LEVY: NOTICE OF OWNERSHIP BY THIRD PARTY: INDEMNIFYING BOND: REPLEVIN OF PROPERTY: DUTY OF SHERIFF.** The defendant, as sheriff, levied an execution upon certain cattle as the property of O. J. M., the execution defendant, and placed the cattle in the care of C. A. M., wife of O. J. M., taking her receipt therefor, and advertised the property for sale. Afterwards C. A. M. notified the sheriff in writing that she, and not her husband, was the owner of the cattle, whereupon the sheriff demanded and received of the execution plaintiff an indemnifying bond. After this, C. A. M. replevied the cattle from the sheriff, and he made return of the execution, showing the levy, the advertisement, and the replevin of the cattle. The replevin suit was decided adversely to C. A. M., on the ground that she was in possession of the property when the suit was begun, but the ownership of the property was not adjudicated. *Held—First*, that it was error for the sheriff to return the writ until after the termination of the replevin suit; *Second*, that the execution, though so returned, was not dead, the indorsement made thereon not being properly a return, because it showed that the property levied upon had not been disposed of; *Third*, that, after the adjudication of the replevin suit, it was the duty of the sheriff to withdraw the execution from the clerk's office, and thereunder to take the property from C. A. M. and sell it; and for his failure to do so, or to otherwise make whole the execution plaintiff, he was liable to the latter upon his official bond.
2. ———: **LIFE OF: SALE AFTER SEVENTY DAYS ON LEVY MADE BEFORE.** Although it is provided by statute (Code § 3037) that an execution shall be returned on or before the seventieth day after its delivery to the officer, yet, where a levy has been made before the expiration of that time, a sale after the expiration of the seventieth day is valid; and in such case an *alias* is not necessary. *Butterfield v. Walsh*, 21 Iowa, 97, and *Stein v. Chambliss*, 18 Iowa, 474, followed.

Appeal from Buchanan District Court.

FRIDAY, DECEMBER 14.

THIS is an action to recover damages for an alleged breach of the official bond of the defendant, Currier, who is sheriff of Buchanan county. There was a trial by the court, and a judgment for the defendants. Plaintiff appeals.

E. E. Hasner, for appellant.

Lake & Harmon, for appellees.

ROTHROCK, J.—The court made special findings of fact from which it appears that in February, 1881, the plaintiff recovered a judgment in the circuit court of Buchanan county against O. J. Marcy and J. B. Edgell, which with costs amounted to about \$242. On the eighth day of February, 1881, an execution was issued on the judgment and placed in the hands of the defendant, as sheriff. On the next day he levied the execution upon eighteen cattle, worth \$25 each, which plaintiff's attorney pointed out to him as the property of O. J. Marcy.

After having levied on the cattle, and on the same day, the defendant placed the property in the care of Wm. Brady and Cora A. Marcy, and took their receipt for the same. Said receipt stated that Currier had levied upon the property as belonging to O. J. Marcy, and that Brady and Cora Marcy would on demand deliver the cattle to Currier at his office in Independence, or would pay to Currier the amount of the judgment and all accruing costs.

On the tenth day of February, 1881, Cora Marcy gave the sheriff notice in writing that she claimed to be the owner of the property levied upon, and that O. J. Marcy was not the owner.

On the next day Currier demanded of Cox an indemnifying bond to secure him for levying on the property, and the bond was given on the fifteenth of the same month.

March 5, 1881, Cora Marcy commenced an action in the circuit court for the recovery of the property which had been levied upon, claiming the ownership thereof, and the right of possession. A writ of replevin was issued and placed in the hands of the coroner of the county, who made return thereon that he took the property and delivered the same to Cora Marcy.

On the second day of April, 1881, Currier made return of the execution, showing a levy upon eighteen cattle, and the advertising of the same for sale, and stating that on March

5th the property had been replevied from him by the coroner.

Afterwards Currier filed an answer in the case commenced by Cora Marcy, in which he alleged that at the time she commenced her action she was in the actual possession of the property, and asked that the action be dismissed at her costs. The cause was tried to a jury, and there was a general verdict finding that Cora Marcy was entitled to the property.

Upon questions propounded by her for special findings, the jury found that she purchased the property in her own name, and managed the farm and dairy in her own name.

Upon a special verdict found in response to questions asked by Currier, the jury found that at the time Cora Marcy commenced her action she was in the actual control and possession of the property in dispute.

When the verdict was returned, Cora Marcy moved to set aside the special finding in response to the interrogatories propounded by Currier, and Currier moved that no judgment be rendered upon the general verdict, but that he have judgment for costs, and a dismissal of the action.

The cause was tried in February, 1882, and the motions attacking the verdict were continued to the April term, 1882, at which time the court ordered that the motion of Cora Marcy to set aside the special findings be overruled, and that the motion of Currier for costs on the special findings of the jury on the plea in abatement be sustained—"such ruling not to be taken as an adjudication of the question of ownership of the property." Judgment was rendered against Cora Marcy for the costs of the action. After the entry of this judgment, George Cox, the plaintiff herein, demanded of Currier, sheriff, that he collect the amount due on the Marcy judgment, either on the receipt given him by Brady and Cora Marcy, or by getting and selling the cattle he had levied upon.

No other execution has been issued on the judgment of Cox against Marcy since the decision of the replevin case, nor has there been any writ, process or order placed in the

sheriff's hands for the purpose of enabling him to collect the judgment.

The appellant makes no objection to the findings of fact, but he claims that thereunder there should have been a judgment for the plaintiff. We think his claim is well founded, and we will state our reasons for so holding, very briefly:

First. The sheriff having been indemnified by Cox, it was his duty to use all proper means to make the levy on the cattle effective.

Second. He should not have made any return on the execution until after the disposition of the replevin suit. The indorsement that he did make on the writ was not properly a return. At that time the levy upon the property remained undisposed of. He should have retained the writ to await the disposition of the suit in replevin.

Third. The judgment in the replevin suit expressly provided that it was no adjudication of the question of the ownership of the property. That judgment was merely a holding that Cora Marcy could not maintain an action to recover property of which she was in possession at the time she commenced her action. It was entirely immaterial what verdict was returned. The court adopted the finding that the possession of the property was held by Cora Marcy when she commenced her suit, and the judgment rendered thereon is conclusive between the parties.

Fourth. After the adjudication, it was the duty of the sheriff to demand the property of Cora Marcy and Brady on their receipt, and retake it, and, if necessary, apply to the court or clerk to withdraw the execution, and to sell the property. The execution was not dead, so to speak. It showed by the indorsement made upon it that a levy had been made which was not discharged, nor the property levied upon exhausted. Having made the levy, it was competent for the officer to exhaust the property on that execution, no matter what time expired between the levy and sale of the property. It is true, it is provided by section 3037 of the Code that an execution shall be re-

2. — : life
of: sale after
seventy days
on levy made
before.

 Hencke v. Johnson.

turned on or before the seventieth day from its delivery to the officer. But where a levy has been made upon property before the expiration of that time, a sale after the expiration of the seventy days is valid. *Butterfield v. Walsh*, 21 Iowa, 97; *Stein v. Chambliss & Banford*, 18 Id., 474. In the last named case, it is said that, to authorize a sale of property after the return day, which was levied upon before that time, an *alias* execution is not necessary. We think the judgment of the district court must be

REVERSED.

68	555
78	349
82	555
116	308

 HENCKE V. JOHNSON.

1. **Covenants of Warranty: BREACH OF: MEASURE OF DAMAGES.**
Until some substantial injury occurs to the grantee in a deed with covenants, no recovery can be had for a breach of the covenant of seizin, except for nominal damages.
2. **Pleading: CROSS PETITION UPON ATTACHMENT BOND: DEFECT OF ALLEGATIONS AND EVIDENCE: PRACTICE.** In a cross-action in an attachment suit for the wrongful suing out of the writ, the defendant must allege that the damages which he claims to have sustained *have not been paid*; and a cross-petition defective in this respect should be assailed by demurrer. But where this allegation is wanting, and no evidence of any damages is offered on the trial, and yet a judgment for damages is rendered, the defect may be urged for the first time upon a motion for a new trial.

Appeal from Winneshiek Circuit Court.

FRIDAY, DECEMBER 14.

THIS is an action to recover damages for the breach of the covenants in a deed for certain real estate. The action was aided by an attachment. The defendant, in addition to an answer putting in issue the plaintiff's right of recovery, set up a claim for damages for the alleged wrongful suing out of the writ of attachment.

There was a trial by the court, and a judgment for plaintiff for one dollar damages for breach of the covenants in the deed, and for the defendant for \$69.85 damages for wrongfully suing out the attachment. Plaintiff appeals.

Brown & Portman, for appellant.

Willett & Willett, for appellee.

ROTHROCK, J.—I. The defendant executed and delivered to the plaintiff a deed for certain real estate, with the usual covenants of warranty. It appears that at the time of the conveyance she was not the full owner of the real estate, and that she owned but an undivided one-third thereof, and that her children, who were minors, owned the other two-thirds. The defendant at the time of the conveyance was a widow, and the property conveyed was inherited from her deceased husband by her and her children. At the time she made the deed she was guardian of the children. Afterwards she resigned her guardianship. Some of the children are now of age, and another guardian has been appointed for those who are yet minors.

When the deed was made, the plaintiff took possession of the property conveyed, and has never been disturbed in the possession, and he has been receiving the rents and profits thereof without molestation from any one.

It is the settled law of this state that, until some substantial injury occurs to the grantee in a deed with covenants, no recovery can be had for a breach of the covenant of seizin, except for nominal damages. *Nosler v. Hunt*, 18 Iowa, 212; *Boon v. McHenry*, 55 Id., 202. In Rawle on Covenants of Title, 100, it is said: "In cases where the failure of title has been such as to cause a technical breach of the covenant of seizin, yet not such as to have visited upon the purchaser any loss of the land, it would be obviously inequitable that he should be entitled to have the damages measured by the consideration money, and, while receiving them, still retain

the land for whose loss they were intended as equivalent."

It appears that one Kessey married one of the defendant's children.

The plaintiff sought to prove a conversation had by one of plaintiff's attorneys with Kessey about the execution of a deed by the guardian of the minor children to the appellant. This was objected to, and the objection was sustained. It appears that plaintiff sought to prove by this conversation that a request was made of Kessey for a deed from the guardian of the minors, and that Kessey refused to have a deed made, and stated that, if a suit was commenced, plaintiff would not get anything, and that Kessey stated that he had authority to speak for the defendant.

This evidence was offered for the purpose of showing that the heirs asserted a claim to the land hostile and adverse to the plaintiff. We think the ruling of the court in excluding the evidence was correct. Even if it be conceded that an adverse claim to the land can be shown by mere conversations between the parties interested, (a point which we need not determine,) there is no showing that Kessey was authorized to speak for the minor heirs.

The appellant also sought to prove a conversation between one of his attorneys and one Tuckey, who is now guardian of two of the heirs. The conversation was excluded. Appellant complains of this ruling of the court. We think the ruling was correct, because there is no intimation in the record as to what was the subject of the conversation.

II. The defendant in her cross-claim for damages upon the attachment bond did not allege that the damages she had sustained by reason thereof *had not been paid*.

The answer to the cross-claim was a general denial. There was no evidence whatever that the defendant had sustained any damages by reason of the wrongful suing out of the writ.

The appellant claims that no recovery can be had without an averment that the damages have not been paid. Such ap-

 Winneshiek County v. Allamakee County.

pears to be the rule adopted by this court. *Ryder v. Thomas*, 32 Iowa, 56; *Horner v. Harrison*, 37 Iowa, 378.

It is true that in those cases the question arose upon demurrer, and in this case the defendant raised the question after the court had rendered judgment and in a motion for a new trial. But in view of the fact that there was no evidence offered of any damages, and as the first intimation plaintiff had that damages would be awarded against him was when the judgment was rendered, we think his objection was not too late.

The judgment will be affirmed upon plaintiff's claim to recover for a breach of the covenants in the deed, and the judgment for damages on the attachment bond will be reversed.

REVERSED.

 WINNESHIEK COUNTY V. ALLAMAKEE COUNTY.

1. **Paupers:** ACTION AGAINST COUNTY OF SETTLEMENT FOR SUPPORT OF: PLEADING. In an action by one county against another for aid furnished to paupers claimed to have a settlement in the defendant county, it is not sufficient for plaintiff to aver that *it is informed* that the paupers have a settlement in the defendant county.
2. ———: ———: ESTOPPEL OF DEFENDANT TO DENY SETTLEMENT: FACTS NOT CONSTITUTING. The giving of notice by the plaintiff to the defendant county that certain paupers had applied for and were receiving aid from the plaintiff, and that defendant was required to provide for the paupers, as contemplated by section 1357 of the Code, and that plaintiff would hold defendant responsible for expenses incurred, followed by the neglect of defendant to notify plaintiff that it denied the settlement and refused to be liable for the support of the paupers, did not estop defendant from denying the settlement of the paupers in an action to recover for aid rendered by the plaintiff county. The estoppel provided for by section 1359 of the Code is not created by these facts, but by others recited in the section last named.
3. **Insane:** ACTION AGAINST COUNTY OF SETTLEMENT FOR EXPENSE INCURRED: JURISDICTION. Where a county which is sought to be charged with the expenses of an insane person denies the settlement of such person, and gives notice of such denial, the circuit court has exclusive jurisdiction to try the issues, but where no notice of such denial is given, the action to recover for such expenses may be maintained in the district court.

Appeal from Allamakee District Court.

FRIDAY, DECEMBER 14.

ACTION to recover for the support of two paupers, and also for certain expenses incurred in behalf of an insane person, and for damages caused by him. The defendant demurred to certain counts of the petition, and moved to dismiss as to other counts. Both the demurrer and motion were sustained. The plaintiff appeals.

Brown & Portman, for appellant.

A. G. Stewart, for appellee.

ADAMS, J.—I. Section 1358 of the Code provides that “the county where the settlement is shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person,” etc. If this action can be maintained for relief furnished poor persons, it must be upon the ground that the persons relieved had a settlement in the defendant county. The question raised by the demurrer is as to whether the petition shows such settlement. The plaintiff in its original petition averred clearly enough that the poor persons had a settlement in the defendant county. Being apparently dissatisfied, however, with having made such averment, it filed an amended petition, and omitted it, and averred that the plaintiff *was informed* that the poor persons had a settlement in the defendant county. We think that we are justified in supposing that the plaintiff intended to change its position in this respect, and not simply make an additional averment. We are confirmed in this view, because the plaintiff in its argument seems to treat the amended petition as a substituted petition. Its position now is that its averment, that the plaintiff *was informed* that the poor persons had a settlement in the defendant county, is equivalent to an averment

1. PAUPERS.
action against
county of set-
tlement for
support:
pleading.

that they had such settlement. But this position cannot be sustained. Its unsoundness is too manifest to require any discussion.

Another position taken is that it is immaterial whether the poor persons had a settlement in the defendant county or not.

2. — : — : estoppel of defendant to deny settlement : facts not constituting. This position is based upon certain averments made in the petition, and admitted by the demurrer, and which, it is contended, when taken as true, show that the defendant is estopped from denying that the poor persons had a settlement in the defendant county.

Without stopping to consider whether, if this is so, the settlement should not be pleaded, we have to say that we think that no estoppel is shown. The plaintiff avers that it served a notice upon the defendant that the poor persons had applied for relief, and were receiving it from the plaintiff, and that the defendant was required to provide for the poor persons as required by section 1357 of the Code, and that the plaintiff would hold the defendant responsible for expenses incurred. The plaintiff also avers that it was not notified by the defendant that it denied the settlement of the poor persons, or refused to be liable for their support. It contends, therefore, that under the statute the settlement of the poor persons in the defendant county became admitted. The statute relied upon is section 1359 of the Code. The county applied to for relief by a poor person having a settlement in another county may make an order of removal of the poor person to the county of his or her settlement, and give notice thereof to such county. The section above cited provides that such order of removal shall be binding on the county to which it is made, unless within thirty days after the receipt of the notice of the order it gives notice of its intention to contest the order. But it is not averred that the plaintiff made an order of removal. What the plaintiff did was to cause the defendant to be notified that the poor persons had become a county charge, and were receiving relief from the plaintiff, and that the plaintiff would hold the defendant re-

sponsible. The effect of this notice was, if the defendant was the county of the poor persons' settlement, to impose upon it the duty of making an order of removal. The defendant was not obliged to serve upon the plaintiff notice of its intention to contest any order, for the reason that no order had been made. The plaintiff had its election to make an order of removal, or trust to the defendant to make one. But, in the absence of any order, the plaintiff was not remediless. If it furnished relief to one or more of the defendant's paupers, it could recover. But the burden was of course upon the plaintiff to show, not only that it had relieved certain paupers, but that the persons relieved were the defendant's paupers. Its difficulty, we apprehend, is that it doubts the fact of the settlement in the defendant county. It seems to be seeking in some way to evade the necessity of proving such settlement. We think that the demurrer was properly sustained.

II. The plaintiff's second claim is based upon the ground that one Barker, having a settlement in the defendant county, was arrested for crime, and sent to the plaintiff county for custody in jail; that while in jail he became insane and destroyed property belonging to the county, and the county incurred expense in conveying him to the asylum. The defendant moved to dismiss as to this claim, on the ground that the court had no jurisdiction of the subject matter thereof; and its motion was sustained. The defendant's position is that the circuit court has exclusive jurisdiction, under the provisions of section 1418 of the Code. That section provides that, where a county which is sought to be charged with the expenses of an insane person denies the settlement, it may give notice of such denial, and the provisions in regard to a disputed claim upon an order of removal of a poor person shall apply to a change of settlement of an insane person. In such case it is claimed that the circuit court has exclusive jurisdiction. Code, section 1359; *Cerro Gordo County v. Wright County*, 59 Iowa,

3. INSANE :
action against
county of set-
tlement for
expense in-
curred : juris-
diction.

 Dedric v. Hopson.

485. But it does not appear in this case that the defendant gave notice that it denied the settlement, or would contest the claim upon that ground. We are unable, therefore, to see that the case is one of which the circuit court has exclusive jurisdiction. We think that the motion to dismiss for want of jurisdiction should have been overruled.

REVERSED.

CS 563
78 366
CS 562
d107 483

 DEDRIC V. HOPSON.

1. **Evidence: RELIGIOUS BELIEF OF WITNESS.** A witness cannot be required to testify to his want of belief in any religious tenet, nor to divulge his opinions upon matters of religious faith. *Searcy v. Miller*, 57 Iowa, 613, followed.
2. **Practice in Supreme Court: BILL OF EXCEPTIONS: CORRECTION OF ERROR IN.** When a bill of exceptions is signed and filed, it becomes a part of the record, and it cannot be contradicted by another certificate signed by the judge and filed as a part of an amended abstract.
3. **Practice: BILL OF EXCEPTIONS: WHAT IT MAY INCLUDE.** A party who has moved to set aside a verdict and for a new trial is not limited in a bill of exceptions to the rulings on such motion, but he may embody in his bill all objections to rulings made upon the trial, and which he has not waived.
4. **Evidence: THE WORD "INCOMPETENT:" MEANING AND USE OF.** The word "incompetent" is used to express the thought that certain evidence cannot lawfully be received, or that a witness cannot lawfully testify. It may properly be used to express the idea that a witness cannot be required to testify to certain facts, as, for example, to his religious belief; and in this case, where a witness was asked so to testify, the proceeding was properly objected to as "incompetent under the law," and the objection so stated should have been sustained.
5. **Evidence: RELIGIOUS BELIEF OF WITNESS: HIS IMMUNITY NOT WAIVED.** A witness does not waive his immunity from testifying to his religious tenets by voluntarily testifying to a part of them; and in this case, because defendant voluntarily testified to his belief in the existence of God, he did not waive his right to refuse to testify to his belief as to a conscious future state.
6. **Bill of Exceptions: TIME OF FILING.** It is not necessary that a bill of exceptions be filed within the time prescribed by statute, if it is filed within the time agreed upon by the parties.

Dedric v. Hopson.

7. **Practice in Supreme Court: TRANSCRIPT IMMATERIAL WHERE ABSTRACTS ARE COMPLETE.** Where the abstract and amended abstract present all that is required to determine the questions raised, the transcript is superfluous, and a motion to strike it from the files, because not complete, will be overruled.
8. **Appeal to Supreme Court: PRACTICE: TRANSMISSION OF TRANSCRIPT: REGULARITY PRESUMED.** A transcript found upon the files of this court will, in the absence of satisfactory evidence to the contrary, be presumed to have come here in the way prescribed by statute; and the certificate of the clerk of the lower court that he delivered the transcript to the appellant's attorneys, without more, does not furnish such evidence.

Appeal from Muscatine Circuit Court.

FRIDAY, DECEMBER 14.

ACTION to recover for the breach of a contract to marry. There was a judgment upon a verdict for plaintiff. Defendant appeals. The facts of the case involved in the questions ruled by the court appear in the opinion.

Richman, Burk & Russell, for appellant.

H. J. Lander and W. F. Hoffman, for appellee.

BECK, J.—I. The defendant was a witness in his own behalf. Upon his cross-examination certain questions were asked him touching his religious belief, intended to show that he did not believe in a future conscious state of existence, to which objections were made, but were overruled by the court, and the witness was required to answer the questions. The grounds of the objections to the questions, as shown by the bill of exceptions, are, that they were "incompetent under the law, and immaterial." The objections should have been sustained, upon the ground that a witness cannot be required to testify to his want of belief in any religious tenet, nor to divulge his opinions upon matters of religious faith. The precise point has heretofore been ruled by this court. *Searcy v. Miller*, 57 Iowa, 613.

1. EVIDENCE:
religious be-
lief of wit-
ness.

II. Counsel for plaintiff insist that the objections to the evidence as shown by the bill of exceptions were not made when the testimony was given, and present a certificate of the circuit judge in an amended abstract, showing that the objections were upon the ground of immateriality of the testimony sought to be elicited, and that, under the constitution of the state, the religious belief of the witness could not be called in question. The proceedings at the trial, as certified in a bill of exceptions, cannot be contradicted by such a certificate. There must be stability and consistency in the records of the proceedings of a court. When a bill of exceptions is signed and filed, it becomes a part of the record. It is not competent for the judge to change or modify it by a contradictory written statement or certificate filed with the papers of the case. If the bill of exceptions is inaccurate, or fails to state the facts through mistake or any other cause, the law provides a way to make the proper correction. But it cannot be done by permitting the bill of exceptions to stand, and adding to the record contradictions thereof. We cannot consider the certificate of the judge referred to, or give it any force whatever.

III. The defendant filed a motion to set aside the verdict and for a new trial, and subsequently "a petition for a new trial," both of which were denied. These facts are shown by an amended abstract filed by plaintiff. After the rulings upon the applications to set aside the verdict and for a new trial, the defendant presented his bill of exceptions, which was allowed and signed by the judge. It complains of and embodies objections to the ruling of the court in requiring defendant upon cross-examination to disclose his religious belief. No other objection is made therein. It was settled and signed by the judge within the time prescribed by the agreement of the parties. Counsel for plaintiff now insist that it was not competent for defendant to object to the rulings upon the evidence in his bill of exceptions,

2. PRACTICE
in supreme
court: bill of
exceptions:
correction of
error in.

3. PRACTICE:
bill of excep-
tions: what it
may include.

and that the objections therein should have been limited to the rulings upon the application for a new trial and to set aside the verdict. This position is not correct. Defendant had excepted to the rulings upon the evidence when they were made, and had in no manner waived objection thereto. His bill of exceptions was filed within the time agreed upon. It was competent for him to embody in it all grounds of objection upon which he desired a review of the case, and to waive others upon which he desired no review. This he did in the bill of exceptions. He waived the objections based upon the denial of the motions for a new trial, and he preserved his objections based upon the rulings upon objections to the cross-examination of defendant as to his religious belief.

IV. Counsel for plaintiff insist that the objection of defendant, made upon his cross-examination, stated in the first point of this opinion, were directed to the competency of the evidence, and were rightly overruled, on the ground that evidence of a witness' religious belief is competent when given in the testimony of other witnesses. It is insisted that the objection of defendant was upon the ground of the incompetency of the evidence, not upon the ground that defendant himself as a witness was required to give such evidence. This position lacks the support of facts disclosed by the record. Upon the questions being asked defendant touching his religious belief, they were objected to, in the language of the record, "as incompetent under the law." This clearly means that the questions or examination was objected to on the ground that it was not authorized by the law. It is not to be understood that the evidence under the rules of the law is inadmissible, but that the examination of the witness in the manner proposed was not authorized by law. The word "incompetency" is familiarly used to indicate the want of lawful authority or power, and that proceedings to which it is applied are contrary to law. It is used to express the thought that certain evidence can-

4. EVIDENCE:
the word "in-
competent;"
meaning and
use of.

Dedrie v. Hopson.

not be lawfully received, or that a witness cannot lawfully testify. It would be quite properly used to express the idea that a witness could not be required to testify to certain facts. In this case it is proper to say that it was incompetent to require defendant to testify to his religious belief. This very thought was expressed by the objection to his examination. A question was asked him requiring an answer disclosing his religious belief. This was objected to as "incompetent under the law." The thought expressed by the language is that defendant could not be lawfully required to answer a question intended to disclose his religious belief.

V. Counsel for plaintiff insist that, if the ruling permitting the cross-examination of defendant objected to was

5. EVIDENCE:
religious be-
lief of wit-
ness: his im-
munity not
waived.

erroneous, it was without prejudice, for the reasons that defendant answered other questions without objection, giving therein substantially the same testimony as he gave in his answers to the questions complained of now, and that his answers were not responsive to the questions. The position is not sustained by the record. The defendant answered questions, without objection, tending to show his belief in the existence of God. The questions objected to sought to elicit his disbelief in a future state of existence. The testimony in the two instances is different. While his answers to the questions objected to are evasive, yet they were doubtless understood by the jury to express disbelief in a future existence. They are capable of no other meaning.

VI. Certain motions made by plaintiff were submitted to us with the case. In the first, the plaintiff asks the court to strike from the record the bill of exceptions, on the ground that it was not settled and filed within the time prescribed by law. But it shows upon its face that it was signed and filed within the time agreed upon by the parties. This is sufficient. *Harrison v. Charlton*, 42 Iowa, 573. The motion is overruled.

VII. Plaintiff also moves in this court to strike the tran-

script, on the ground that it is not a complete transcript of all the records in the case, and was, when completed, delivered to the attorney of defendant, and was not sent by the clerk to this court in the manner prescribed by Code, section 3179.

7. PRACTICE in supreme court: transcript immaterial when abstract complete.

In the first place, the transcript, as shown by the abstract filed by defendant and the amended abstract filed by plaintiff, contains all that is required to present the questions raised in the case. Nothing more is necessary. Code, § 3179.

In the second place, while the certificate of the clerk of the circuit court shows that the transcript was delivered to the attorneys of the parties, it does not show that it was not sent by him, in the manner directed, to the clerk of this court. His statement of the delivery of the transcript to defendant's attorneys does not necessarily imply that he did not afterwards forward it in the manner directed by the statute to the clerk of this court. We will therefore presume that it came here in the regular way.

8. APPEAL to supreme court: practice: transmission of transcript: regularity presumed.

The foregoing discussion covers all questions in the case presented for our consideration. The judgment of the circuit court, for the error committed in the cross-examination of defendant, is

REVERSED.

BIRD V. ST. MARK'S CHURCH OF WATERLOO.

62 567
96 64

1. **Evidence: MEANING OF ECCLESIASTICAL TERMS: TESTIMONY OF BISHOP.** The testimony of a bishop of the Protestant Episcopal church is competent to define the meaning of the terms "parish" and "rector," as used in said church.
2. —: **FACTS OR OPINIONS: EXCLUSION OF MUST BE JUSTIFIED BY OBJECTIONS STATED.** The testimony of the bishop of the Protestant Episcopal diocese of Iowa as to the organization of the defendant parish, and its admission into union with the diocesan convention, was not

 Bird v. St. Mark's Church of Waterloo.

the expression of an opinion, but the statement by a competent witness of facts, which were relevant and material to the issues in this case; and, though the testimony may have been vulnerable to the objection that it was secondary, it was error to exclude it on the ground—the only one urged—that it was “incompetent, immaterial, and the statement of an opinion.”

3. **Contract: EMPLOYMENT OF RECTOR BY PARISH OF PROTESTANT EPISCOPAL CHURCH: RIGHT OF PARISH TO DISSOLVE PASTORAL RELATION.** A parish of the Protestant Episcopal church, by its admission into union with the diocese of Iowa, and its connection through that with the Protestant Episcopal church of the United States, acknowledges the authority of the constitution and canons of that church, and becomes amenable thereto; and, according to these canons, a rector canonically elected and in charge may not be removed by his parish against his will. Neither may this be done indirectly by the reduction of his salary as contracted for at the time of his election. And, until the dissolution of the pastoral relation in some manner provided by the canons of the church, he may recover for his services the salary provided in the original contract.
4. **Religious Corporations: INTERFERENCE OF COURTS WITH.** The civil courts will not revise the decisions of churches or religious associations upon ecclesiastical matters, but will interfere with such associations when civil or property rights are involved.

ADAMS, J., *dissenting*.

Appeal from Black Hawk Circuit Court.

FRIDAY, DECEMBER 14.

THE plaintiff brings this action for the recovery of \$206.50, a balance which he alleges to be due him as rector, for the year 1880, of St. Mark's church of Waterloo, of the denomination known and styled “The Protestant Episcopal Church in the United States of America.” Upon the production of the plaintiff's evidence, the court, upon motion of the defendant, directed a verdict for the defendant. The plaintiff appeals.

Alford & Gates and C. W. Mullan, for appellant.

H. Boies, for appellee.

DAY, CH. J.—I. The plaintiff took and offered in evi-

dence the deposition of William Stevens Perry, bishop of the Protestant Episcopal diocese of Iowa. The defendant moved to suppress interrogatories five and six, and the answers thereto, in this deposition, upon the ground that they were immaterial and incompetent, and the answers state an opinion or conclusion of the witness, instead of facts, and are not pertinent to any issue involved in the action. The court sustained the motion, and this action the plaintiff assigns as error. The portion of the deposition suppressed contains the following evidence: "A parish is also the individuals who associate themselves under articles of incorporation, and, in their formal application for admission, on their pledge of conformity to the diocesan and general legislation of the church, are received into union with the diocesan convention. St. Mark's parish, Waterloo, is such an association of individuals, formerly admitted into union with the diocesan convention of The Protestant Episcopal church in Iowa, in 1863, and still in union with said convention, and, in common with other parishes, amenable to the diocesan and general canons. A rector, as the word is understood by the canons of the church, is a duly ordained clergyman of the church, in priest's orders, who has been elected to the rectorship by the vestry of the parish, agreeably to the canons of the church, and in whose call, or invitation, or notification of election, there is no limitation of time specified when the engagement, or contract (for such the engagement between the clergyman and vestry, as two principals, is considered) is to cease."

This portion of the deposition was improperly stricken out. It was certainly competent to prove by the bishop of the church the meaning of the words parish and rector, as understood by the canons of the church. But the important and material portion of this testimony is that which states that St. Mark's parish, of Waterloo, was formally admitted into union with the diocesan convention of The Protestant Episcopal church in Iowa. Such admission rendered the defendant

1. EVIDENCE:
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ecclesiastical
terms: testi-
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2. —: facts
and opinions:
exclusion of
must be
justified by
objection
stated.

amenable to the canons of the church which, the evidence shows, are adopted by general or diocesan conventions—the general convention composed of clerical and lay deputies, meeting every three years, and possessing supreme legislative power, and the convention of the diocese, composed of the clergy and lay deputies from each parish, meeting annually. It was not objected that this evidence was secondary, but that it was incompetent, immaterial, and the statement of an opinion. The evidence was both competent and material, and the statement of a fact and not of an opinion. The court erred in suppressing it.

II. The error of the court in rejecting the evidence offered is, however, immaterial, unless the testimony offered, in connection with that produced upon the trial, was

3. CONTRACT : employment of rector by parish of protestant episcopal church: right of parish to dissolve the pastoral relation. sufficient to warrant a finding for the plaintiff. It therefore becomes necessary to consider the effect of the entire testimony offered by the plaintiff. The evidence shows that the association of St. Mark's church, of Waterloo, Iowa, adopted articles of incorporation, the preamble to which is as follows: "We, whose names are hereunto affixed, deeply sensible of the truth of the Christian religion, and earnestly desirous of promoting its holy influences in our own hearts, and in those of our families and neighbors, do hereby associate ourselves under the name of St. Mark's parish, in communion with the Protestant Episcopal church in the United States of America and the diocese of Iowa, the authority of whose constitution and canons we do hereby recognize, and to whose liturgy and mode of worship we promise conformity."

Article one provides: "This association is incorporated by the name and style of St. Mark's church of Waterloo, Black Hawk county, Iowa."

Article five provides: "The members of this corporation desire admission into union with the convention of the diocese of Iowa." Bishop Perry testifies that St. Mark's parish,

Waterloo, was formally admitted into union with the diocesan convention of the Protestant Episcopal church in Iowa, in 1863. The diocese of Iowa comprises the entire state, and was, on joint vote of two houses of general convention, admitted into union with the church in the United States. The constitution of this diocese, article one, provides as follows: "This church, as a constituent part of the Protestant Episcopal church in the United States of America, acknowledges the authority of said church.

The fifth canon, section three, provides: "It shall be the duty of the vestry to elect the rector, except in the case of the bishop's church, and supply services where there is no rector."

Section five provides: "Wherever the term rector is used in this or any other canon of this diocese, it is to be understood of any minister duly elected by the vestry to the charge of a parish; and it is hereby recommended that every rector be instituted, according to the provisions of the church."

Canon four, title two, of the canons for the government of the Protestant Episcopal church in the United States of America is entitled: "Of differences between ministers and their congregations, and of the dissolution of a pastoral connection." Section one provides: "A rector canonically elected and in charge, or an instituted minister, may not resign his parish without consent of said parish, or its vestry, (if the vestry be authorized to act in the premises,) nor may such rector or minister be removed therefrom by said parish or vestry against his will, except as hereafter provided."

The next section provides for the dissolution of the pastoral relation, when the parties cannot agree respecting the separation, by the bishop, acting with the advice and consent of the standing committee of the diocese or missionary jurisdiction."

At a meeting of the vestry of defendant, December 23, 1878, "it was moved and carried unanimously to accept Rev.

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F. M. Bird's proposition to become rector of St. Mark's parish at a salary of \$1,000 a year. It was resolved that the secretary notify Rev. F. M. Bird of his election as rector of St. Mark's parish." On January 4, 1879, the secretary of the vestry gave the plaintiff formal notice in writing of his election, as follows: "I take great pleasure to inform you that, at a meeting of St. Mark's vestry, December 23, 1878, you were elected as rector of St. Mark's parish, service to commence and date from January 1, 1879." The plaintiff accepted this appointment, and entered upon the discharge of his duties January 1, 1879. For that year he was paid in full, one thousand dollars. In the month of November, 1879, he received a communication from the secretary of the vestry, as follows: "At a meeting of St. Mark's vestry, held November 11, 1879, the following resolution was introduced and adopted: '*Resolved*, That, whereas there will be a large deficiency in the finances for the present year, and there being no prospect for an increased revenue for the coming year, and not desiring to incur any liability in excess of our resources, we hereby tender you for your salary in full, for the year 1880, the full proceeds of pew rents.'" The plaintiff communicated with the vestry very shortly after this notice, and told them that it was not in their power to set aside the contract without his consent, which consent he refused to give, and that he held them to their contract as binding. At a meeting in January, 1880, a member of the vestry desired the plaintiff to accept the pew rents for 1880, and relieve the vestry of further responsibility, which the plaintiff refused to do, and he never at any time assented to the defendant's proposition. The plaintiff continued to perform the duties of rector until January 1, 1881, when the relation between him and the parish was dissolved. For the year 1880, the plaintiff has received the pew rents, amounting to \$793.50. He claims that he is entitled to the sum of \$1,000 for that year.

The defendant, by its articles of incorporation, its admis-

sion into union with the diocese of Iowa, and its connection through that with the Protestant Episcopal church of the United States, acknowledged the authority of the constitution and canons of that church, and became amenable thereto. One of these canons is that a rector canonically elected, and in charge, may not be removed by his parish, against his will. The plaintiff was elected rector by the vestry of defendant in accordance with the canons of the diocese of Iowa. When he accepted the position and entered upon the discharge of his duties, the relation between him and his parish was assumed under, and became subject to, the canons relating to differences between ministers and their congregations, and the dissolution of a pastoral connection. It was not competent for the vestry of the parish, in violation of the canons of the church, to dissolve the pastoral relation against the plaintiff's will. These canons became just as much a part of the contract of employment of plaintiff as if they had been specifically referred to, or written out in full therein. The salary upon which the plaintiff was employed constitutes an essential part of the contract. If the defendant could be permitted to reduce the plaintiff's salary without his consent, it could force him to agree to a dissolution of the pastoral relation, and thus accomplish indirectly what it could not do directly. The right to the salary stipulated at the time the plaintiff accepted the position of rector is a valuable property right secured to the plaintiff by contract. One party to the contract cannot ignore its provisions or violate them with impunity. The civil courts will not re-

4. RELIGIOUS
corporations:
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with.

vise the decisions of churches or religious associations upon ecclesiastical matters; but they will interfere with such associations when rights of property or civil rights are involved. *Chase v. Cheney*, 58 Illinois, 509, (537); *O'Hara v. Stack*, 90 Pa. St., 477, (491); *Avery v. Inhabitants of Tyngingham*, 3 Mass., 159, (167); *Sheldon v. Congregational Parish*, 24 Pick., 281; *Lynd v. Menzies et al.*, 33 N. J. L., 162; *Batterson v. Thompson*, 8

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Phil. Rep., 251. In this case the plaintiff has performed the duties of rector for the defendant for the year 1880. He has been paid but a part of the salary promised him when he assumed the duties of that position. He has never consented to a reduction of his salary. A clear legal right of the plaintiff has been invaded, and it is the duty of the civil courts to protect and enforce that right. We think the plaintiff is entitled to the balance of the salary which formed the consideration of the contract between him and the defendant. The judgment of the court below is

REVERSED.

ADAMS, J.—*dissenting*. The defendant is a religious corporation incorporated under the laws of Iowa. The provisions of law under which the defendant was incorporated cannot be dispensed with by contract. One of the provisions of law under which the defendant is incorporated is that the corporation may annually or oftener elect from its members trustees, directors or managers. Another provision is that the trustees, directors, or managers shall have the control and management of the affairs of the corporation. Code, § 1097. The defendant elected trustees, directors, or managers, which it called vestrymen. Under the statute, I think that they had the control and management of the affairs of the corporation. What precisely the word "affairs," as used in the statute, embraces, when applied to a corporation like the defendant, we need not determine. It may be that affairs of such a corporation which are of an ecclesiastical or canonical character are not within the control of the vestrymen. But some affairs manifestly are, and I think that all are which pertain strictly to the civil rights and liabilities of the corporation. Among them is the matter of its finances. The vestrymen are supposed to understand its resources, present and prospective, and must be allowed to determine from time to time its expenditures, and graduate them accordingly. An incurment of liabilities beyond its resources

would not only be bad management, but bad morals. Even the religious interests of the society would probably suffer, to say nothing of the rights and interests of others. The statute has accordingly reposed this matter of financial administration where it can be done most safely. It has reposed it in a board of men selected expressly for their qualifications for such administration from the society itself. The power to dissolve the pastoral relation is quite a different thing. It may be that such power may properly enough be reposed elsewhere. The expediency of such dissolution may rest upon considerations of which others not so immediately interested can more properly judge. For the purposes of this opinion it may be conceded that this power is not reposed in the vestrymen. But it does not follow that they may not be allowed full control of the financial affairs of the corporation, including that of the compensation of the rector, so far as that is a matter of contract on the part of the corporation. It is not to be supposed that such a board would withhold compensation for the mere purpose of accomplishing by indirection the dissolution of the pastoral relation in violation of a canon of the church. If such a case should occur, it may be that the action would be void. But that is certainly not the case before us. The defendant appears to have acted in the utmost good faith. So far as I can see, it pledged all its resources upon which it could rely with any certainty.

I think that we may give the statute full force, and not materially interfere with the canon which the plaintiff invokes in his behalf. But, if there is any conflict, the statute must be held paramount.

TROUGHEAR, ADM'R, v. THE LOWER VEIN COAL CO.

1. **Negligence of co-employee:** MINING COMPANY NOT LIABLE FOR INJURY OCCASIONED BY. A mining company is not liable for injuries caused to one of its employees by the negligence of a co-employee. *Peterson v. The Whitebreast Coal and Mining Company*, 50 Iowa, 673, followed.
2. **Instructions:** MUST PERTAIN TO THE ISSUES AND BE FOUNDED UPON THE EVIDENCE. An instruction which presents issues not made by the pleadings, or which calls for a finding of facts of which there is no evidence, is erroneous.

BECK, J., from his view of the theory and facts of the case, *dissents*.

Appeal from Boone Circuit Court.

FRIDAY, DECEMBER 14.

THE petition states that the defendant is engaged in the business of mining coal, and that it was its duty to "provide good and safe mines, and to keep them in good repair, and particularly to see to and provide good, safe, sufficient and properly placed supports, props, good and safe road ways, and good working faces." That defendant, not regarding its duty in this respect, negligently failed to provide the necessary timber to secure the mine where the plaintiff's intestate was engaged in mining coal for the defendant. That defendant undertook to fix and repair the road-way where the deceased was working, and that, after defendant had pretended to fix and repair the road-way, and had informed the deceased that the same was in good and safe condition, the deceased proceeded to work in said mine, when a large rock, which had been left without support, fell on the deceased, whereby he was greatly injured. "That said injury was caused solely by the failure of the defendant to properly support the roof where said rock fell, and which it was its duty to do." There was a trial by jury, verdict and judgment for the plaintiff, and the defendant appeals.

Kidder & Crooks, for appellant.

Sutton & Childs, for appellee.

SEEVERS, J.—There was evidence tending to show that Sheppard was defendant's superintendent, McKinna was the pit boss, and Brady and Parsons were road men.

McKinna had full charge of the mine, but had no authority to hire or discharge the employes, but Sheppard had such power. It was McKinna's duty to see that the mine was in proper condition. When the roof of the mine was discovered to be unsafe, it was the duty of the road man to put it in proper and safe condition. The evidence tends to show that the deceased was injured by a rock falling from the roof on him while he was working in the mine. The evidence further tends to show that McKinna had knowledge that the roof was unsafe, and that he directed or the road men undertook to make it safe and secure by propping. Brady made an attempt to do this the evening before the accident. Parsons put props under the rock, and informed the deceased that it was now in safe and good condition. The decedent went to work, and the accident immediately thereafter occurred.

The accident was undoubtedly caused by the failure of the road men to sufficiently prop or remove the rock from the roof. It is clear that the road men and deceased were co-employes, and the court so instructed the jury. In *Peterson v. The Whitebreast Coal and Mining Co.*, 50 Iowa, 673, it was held that the principal was not liable for injuries recieved by an employe through the negligence of a co-employe. The circuit court seems to have adopted this view, and instructed the jury as follows:

"7th. The defendant is liable for carelessness and negligence in the selection of its employes, and where the employment involves great danger to life, the degree of care and prudence in selecting and employing such employes must be

such as would be exercised by a reasonably prudent person, having due regard for human life, and for the services to be performed; but it cannot be held for injuries arising from the carelessness and negligence of co-employees.

"Co-employees are those engaged in the same general business, working to the accomplishment of the same general purpose. The person who mines the coal, and he who labors upon the road-way in miners' rooms, are co-employees and fellow workmen.

"8th. If, therefore, the defendant, through its superintendent, Sheppard, carelessly or negligently selected and employed indiscreet or negligent servants to perform services in its mine, or, having employed such, retained him or them in its service, when he knew, or by the exercise of ordinary care and prudence might have known, of his or their unfitness for the employment or work to be performed, it is guilty of negligence."

It will be seen that the court submitted to the jury the question whether Sheppard had been negligent in employing careless and improper men in the mine, through whose negligence or inefficiency the deceased was injured. Indeed, as we understand, this was the only question as to the negligence of the defendant which was submitted to the jury. Our opinion is confirmed in this respect by counsel for the appellee, who in their argument say: "The only theory for the recovery of the plaintiff which the charge of the court contains, as we view it, is that the defendant, if liable at all, was liable on account of its careless and negligent selection of the roadman, Parsons."

The instructions in this respect are clearly erroneous, because there is no such issue. It is not alleged in the petition that Sheppard was negligent in employing Parsons. The plaintiff does not seek to recover on this ground, but because the mine was not kept in a safe condition, and because the roof was not sufficiently propped or otherwise protected. There was error in giving the eighth instruction above set

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out, for the further reason that there was no evidence introduced upon the trial justifying it. There is an entire absence of evidence that Sheppard carelessly or negligently employed in discreet or negligent servants, or that the persons employed by him were unfit for the work to be performed by them. We have frequently held that it is error to submit to the jury and call upon them to make a finding upon facts of which there is no evidence.

REVERSED.

BECK, J.—*dissenting*. I cannot concur in the foregoing opinion.

1. The opinion, as I understand the record, is not accurate in the statement that, whether Sheppard was negligent in employing incompetent men was the only question involving the defendant's negligence submitted to the jury. The petition, as shown by the quotations therefrom in the majority opinion, charges defendant with negligence generally in not keeping the mine in good repair, and in failing to keep good and sufficient props, etc. Negligence in not employing capable men is not referred to in the petition. In the fourth instruction, the jury were directed as to the liability of defendant for the negligence contemplated in the quotation from the petition made in the majority opinion. The court below, doubtless, correctly considering that negligence in employing incompetent men was covered by the petition, therefore instructed the jury upon that character of negligence. But it is a grave mistake to claim that the only question of negligence considered in the court below related to the fitness and competency of men employed by defendant.

The statement of plaintiff's counsel quoted by the majority was made as presenting a ground for the support of the judgment. The record clearly shows that it is erroneous, and that there was another "theory for the recovery of the plaintiff," besides the one based upon negligence in employing incapable men. A very cursory reading of the record discloses the

error of counsel in their statement, upon which they base an argument in support of the judgment rendered in the court below. We are not authorized to reverse a judgment for the reason that counsel for appellee attempts to support it upon insufficient grounds, based upon an inaccurate statement of the contents of the record. It would be a very unsafe rule to try causes here upon arguments of counsel. They are tried upon the facts. It often happens that correct decisions of the courts below are attempted to be upheld by very unsound argument advanced by counsel. We cannot reverse a case on the ground that a bad reason is given for affirming it.

II. It will be observed that McKinna was the "bank boss," and Brady and Parsons were the "road men" referred to in the statement of the facts of the foregoing opinion. I am clearly of the opinion that the jury were authorized to find that the "bank boss" was negligent in not personally inspecting the roof of the mine before the props were put up, in order to direct the work before it was done.

He was charged with the duty of inspecting the mines. The object of such inspection was to secure safety to the workmen, and protection to the property of defendant. This duty was not discharged by hearing complaints of the condition of the roof, and sending a workman to put in props. He could not delegate his authority to a workman, and substitute the workman's skill and intelligence for his own. The manager says that this inspection was his "personal charge." We think the jury may well have found that McKinna, the "bank boss," was negligent.

III. Was McKinna a co-employee of the intestate? If he sustained that relation, plaintiff cannot recover on the ground of his negligence. The rule prevails in this state that an employee cannot recover of his employer for the negligence of a co-employee. *Sullivan v. M. & M. Ry Co.*, 11 Iowa, 421; *Peterson v. The Whitebreast Coal and Mining Co.*, 50 Id., 673.

The character of the duties of the person charged with

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negligence will determine whether he shall be considered as a co-employee within this rule. If the person charged with negligence and the person injured are engaged in the same general business, though they may be employed in different grades of service, the first holding authority to direct the last, they are regarded as co-employees. But when the employer commits the management of the business wholly to one charged with its prosecution, reserving no control over it, the negligence of such an one is the negligence of the employer. If a person thus employed commits the management of a part of the business, or entrusts certain duties and responsibilities connected with the management, to the charge of an employee, it is plain that he stands, as does his immediate superior, in the place of the employer. He thus becomes what may be called a vice-principal. The person wholly entrusted with the management of the business may be called a manager. The one to whom he confides the management of a part of the business, or certain departments of it, may be called an assistant.

If the assistant is clothed with the same authority and discretion in directing the enterprise that is conferred upon the manager, he, so far as his authority goes, stands in place of the manager. They are both vice-principals.

It cannot be doubted that the manager is not to be regarded as a co-employee of a workman injured through the manager's negligence. If the nature of the business is such that he cannot give it his personal supervision, and it therefore becomes necessary for him to employ an assistant, giving him complete control of a part of the business, the assistant taking the place of the manager therein, he becomes in fact a manager of that department, and a vice-principal. I think this conclusion is sustained by principles drawn from the preponderance of authorities which are fully cited in that complete work, *Thomson on Negligence*—see Vol. 2, pp. 1028, *et seq.*, 1026, 974. See also *Wharton's Law of Negligence*, § 229, and *Shearman and Redfield on Negligence*, § § 102, 104, *et seq.*

I am clearly of the opinion that the jury were authorized to find that through McKinna's negligence the intestate was injured, and that McKinna was, as vice-principal, clothed with authority which rendered him a representative of the defendant, and that for his negligent acts the defendant is liable.

IV. As I understand the foregoing opinion, the judgment is reversed on the ground that the instructions relating to negligence in the employment of incompetent men should not have been given, because no issue involving such negligence is presented in the pleadings. To my mind this position is obviously incorrect. The petition declares upon negligence in failing to keep the mine in good repair, and the roof thereof safely propped. The defendant was bound to do these things. Being a corporation, it of necessity could discharge the duty only through employes. Negligence in employing incapable men to do this duty for them, whereby the mine became unsafe, is negligence in failing to keep it in a safe condition. In short, any act or omission of defendant, which resulted in rendering the mine unsafe, amounts to negligence. In other words, defendant was bound to keep the mine in a safe condition. It failed to do this through employing incompetent men. It was, therefore, negligent. The manner of the negligence was in the employment of unfit men. The negligence was alleged in the petition. It was not necessary to allege the manner in which it occurred. It could be proved without such allegation. It was, therefore, involved in the issues in the case.

It is my opinion that the judgment of the circuit court ought to be affirmed.

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TOMES, INTERVENOR, ET AL. V. SLEEPER ET AL.

1. **Deed of Trust: BENEFICIARY NOT NAMED: ENFORCEMENT OF TRUST.**

A trust created by a deed which is sufficient in all respects, except that it fails to name the beneficiary, may be enforced by the real beneficiary as against a purchaser from the trustee with notice of the trust, in a case where the name of the real beneficiary is supplied by the testimony of the trustee.

Appeal from O'Brien District Court.

SATURDAY, DECEMBER 15.

IN July, 1880, Jno. H. Iselin and Henry H. Iselin were partners, doing business under the name and style of John H. Iselin & Co. As such partners they became indebted to the First National Bank of St. Paul and A. W. Sleeper & Bro. To secure said indebtedness, John H. Iselin and wife and Henry Iselin executed to A. W. Sleeper, trustee, a deed of trust on certain real estate. The plaintiffs are the assignees of the beneficiaries in the deed of trust, and entitled to enforce the lien thereof. This action was brought for that purpose. Henrietta C. Tomes intervened, claiming that she owned a portion of the real estate described in the trust deed, and that as to such portion it should not be enforced. Certain other persons were made parties by the intervenor, and she asked that she be decreed to be the owner of the real estate claimed by her, and for other relief. The issues between the plaintiffs, defendants and intervenor, by agreement of the parties, were submitted to the court. There was a finding and judgment for intervenor, and the plaintiffs and intervening defendants appeal.

Barrett & Bullis, for appellants.

Joy & Wright, for appellees.

Sleeper et al. v. Iselin et al.

SEEVERS, J.—In 1875, John H. Iselin became the trustee of intervenor in relation to certain stocks and bonds owned by the latter. In 1879, John H. Iselin suggested to the intervenor the propriety of converting the stocks and bonds into money, and investing the proceeds in certain real estate in Sheldon, Iowa. As an inducement to make such investment, Iselin represented to the intervenor that she would receive a larger annual income therefrom than she obtained from the stocks and bonds. The intervenor adopted the suggestion, and authorized said Iselin to sell the stocks and bonds, and invest the proceeds in real estate, as suggested by him. At that time John H. Iselin was the owner of the property in controversy, and he converted the stocks and bonds into money, and the same was placed to his credit on the books of John H. Iselin & Co., and the same was used by said firm in the partnership business, and, in consideration of said money, John H. Iselin and wife conveyed the property in controversy to John H. Iselin, trustee, in December, 1879. This conveyance is in the usual form of warrantee deeds, and was duly acknowledged, and filed for record in January, 1880. At the time the deed of trust under which the plaintiffs claim was executed, as we find from a preponderance of the evidence, the trustee and the beneficiaries therein named had express notice of the conveyance to John H. Iselin as trustee for the intervenor. The appellants insist that the trust attempted to be created by the conveyance to John H. Iselin, trustee, is an express trust, and that the same cannot be enforced against them as subsequent encumbrancers, because of the existence of a statute which is as follows: "Declarations or creations of trust or powers relating to real estate must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law." Code § 1934. The intervenor contends that it makes no difference whether the trust is express or resulting—that, under the circumstances of this case, it may and should be enforced against the appellants.

I. The conveyance to John H. Iselin, trustee, was executed in all respects as are deeds conveying real estate. The property—the subject of the trust—is sufficiently described, and the only objection taken thereto is that the beneficiary is not named, and, as this must be supplied by parol, it is contended that the alleged trust is void, or at least that the lien of appellants has priority thereto. Many authorities have been cited by appellants in support of their position, which have been examined with the care which the importance of the case requires. But we do not think they are applicable, because of the fact which we now proceed to state:

John H. Iselin admits the trust—that is to say, he testifies as a witness that the conveyance was made to himself as trustee, for the use and benefit of the intervenor, in consideration of money received by him belonging to her. This being so, the trust as against him could certainly be enforced, because it is alleged by the intervenor and admitted by the party named in the conveyance as trustee. The appellants, or those under whom they claim, had express notice that the real estate in controversy had been conveyed to John H. Iselin, trustee for the intervenor. It is the established rule that one who purchases from a trustee with notice of a trust takes the property subject thereto. *Perry on Trusts*, § 217.

We do not think the appellants have any better right than John H. Iselin; and, as the trust can be enforced against him, it can be against them. It is insisted that no trust is pleaded by the intervenor; but the facts are fully stated. It therefore becomes a question of law as to which party has the prior right.

AFFIRMED.

FORD ET AL. V. LOOMIS ET AL.

1. **Injunction: DAMAGES ON BOND: ATTORNEY'S FEES TO DEFENDANT.**

It may be regarded as the settled rule of this state that an attorney's fee is allowable to the defendant where an injunction is dissolved upon motion, or where it is dissolved upon the final hearing, when the injunction is the only relief sought; but where a motion is made to dissolve an injunction as a whole, and not merely for a modification of it, where a modification is all that the defendant is entitled to, and all that he secures, he cannot, in an action on the injunction bond, recover all the fees paid his attorney for services in relation to such motion. Whether a part of such fees could be recovered is a question not arising in this case.

2. ———: ———: **FACTS NOT WARRANTING.** Where the injunction defendant, anticipating an injunction, made extraordinary efforts and accomplished the object sought to be enjoined before the writ was served, he cannot claim that he was delayed by the injunction, and recover damages for such delay.

Appeal from Delaware Circuit Court.

WEDNESDAY, JUNE 13.

THE defendant, Loomis, obtained an injunction against the plaintiffs, J. W. Ford and Geo. Ford. Afterward the action was dismissed by him. This action is brought upon the injunction bond to recover for damages alleged to have been sustained by reason of the injunction, and also for attorney's fees alleged to have been paid. There was a trial to the court, and judgment was rendered for the plaintiffs. The defendants appeal.

A. S. Blair, for appellants.

Bronson & Leroy and *E. M. Carr*, for appellees.

ADAMS, J.—The controversy out of which the injunction suit grew arose in respect to a partition wall. The plaintiffs are the owners of a certain lot in the city of Manchester, and the defendant, Loomis, is the owner of the lot adjacent there-

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88	375
62	586
101	484

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143	512
143	516

to on the south. Loomis improved his lot several years ago, by the erection of a building, the first story of which is owned and occupied by him, and the second story is owned and occupied by the city as a town hall. The wall in question was built by Loomis, one-half upon his own lot, and one-half upon the Ford lot, then owned by one Tate. Half of the cost of the wall was paid by Tate. In 1881, the plaintiffs, having purchased of Tate, erected a stone building two stories high, each story being somewhat higher than the corresponding story of the Loomis building. In erecting their building, they joined on to the partition wall in question. In joining on, they commenced making changes in the front of the wall. They cut into it and removed alternate bricks, and inserted cut stone extending part way across. Loomis regarded this change as an injury to the appearance of the wall, and an infringement upon his rights, and so notified the Fords, and asked them to desist from changing the style of architecture. They did not desist, but, apprehending an injunction, pushed forward their work by working extra hours. Their aim was to get their front wall constructed above Loomis' story before he could enjoin them. Seeing that they could not succeed in getting the whole of their front wall thus constructed, they neglected a part of it, and devoted themselves to that part next to Loomis. Whether they succeeded, before the injunction was served, in getting their wall next to him higher than his story, is a question upon which the parties are not agreed, but is one upon which the appellants claim that there is a conflict of evidence. After the injunction was served, the appellees delayed a little in some portion of their work. They completed their front wall, however, in a short time, and did not, so far as the evidence shows, make any change in their plans. They did shorten a galvanized iron cornice which was put over the first story, but it was left long enough to extend to the middle of the partition wall, and, according to the testimony of the plaintiffs, which is undisputed, they shortened

it to correct a mistake and make it conform to the original plan. The appellees proceeded to the completion of their building before the case could be tried, and, at the first term of court, Loomis dismissed his action. This action was then brought by the appellees on the injunction bond, and a recovery was allowed in the sum of \$132, to-wit, \$70 as attorney's fees, \$50 for delay in mason work, and \$12 for rental value of building during time of delay.

The appellants insist that the undisputed evidence shows that the appellees were not in fact delayed, and were in no way injuriously affected by the injunction, and farther, that, as the injunction was not dissolved on motion, nor upon a hearing upon the merits, the appellees are not entitled to attorney's fees.

Whatever conflict of authority there may have been, it may now be regarded as the settled rule, especially in this state, that an attorney's fee is allowable where an injunction is dissolved on motion. *Behrens v. McKenzie*, 23 Iowa, 341; *Corcoran v. Judson*, 24 N. Y., 106; *Edwards v. Bodine*, 11 Paige, 223. So, too, it is allowable if the injunction is dissolved on final hearing, if the injunction is the only relief sought. *Reece v. Northway*, 58 Iowa, 187. Possibly it should be allowed in some cases where the injunction is not dissolved, either on motion or final hearing, as where the plaintiff in the injunction suit wrongfully enjoins the defendant for a time, and the latter employs an attorney who renders services, and afterward, and before there is any determination, the action upon the plaintiff's own motion is dismissed. But in this case the appellants contend that the injunction, so far as any question before the court is concerned, proved to be abortive, the appellees having rendered it so by their diligence in consummating the acts sought to be prevented, before the writ could be served. To determine whether this is so, we must look into the writ, and see what acts it purports to enjoin, and then into the evidence, to see whether those acts had already been done. The acts which

the writ purports to enjoin are the "injuring, defacing, marring, or changing the style of architecture of any portion of the front wall of the store building of said L. A. Loomis, * * * by removing any portion of the wall of said building and inserting in lieu thereof cut stones, or other material, differing from the original material of the walls of said building, or making in the walls of said building projections, cornices, or other architectural work, changing the original character of the same." Loomis' store was one story high, and the acts sought to be enjoined pertained to the partition wall one story high, and to the cornice designed to go over the appellees' first story. Now, how much of this had been done when the writ was first served? The cornice had not been put on, but it appears to us that the other acts sought to be enjoined had been done. That part against Loomis was built up in the exercise of extraordinary diligence, and in advance of the other parts. The foreman of the appellees' work, one Trenchard, testified as follows: "When Ford brothers understood that Mr. Loomis was to serve an injunction on them, they got me up, and got my force out, and got the wall above Loomis' store, and laid the brick there in the night before the injunction was served. They got it laid some three or four courses above the city hall floor, and above Loomis' part. The brick was laid up on the corners as far as it touched Loomis' building. The balance of the front wall was left open. But so far as it touched Loomis' building it was run up above his building. It was above the town hall floor. We were out before daylight in order to get the masons at work. I heard the Fords say, when they heard the train coming in, they had got out of the way of Loomis' injunction." As to the height of the work, he is corroborated by Loomis and another witness, and disputed by no one, not even by the plaintiffs, although one of them was upon the stand and was examined as a witness in their behalf. The only pretense of any conflict arises upon the testimony of one Ehlers. He testified as follows: "When the injunc-

tion was served, we did not have the wall built quite up to the second story. I know it was not very far from it. The first story brick was not up, to my knowledge. I won't swear that the brick next to Loomis' wall was not clear up to town hall." This testimony is in no way in conflict with that of Trenchard and the others, but harmonizes with it. The first story front wall was not up as a whole, but only that part next to Loomis. All the change or defacement, then, so far as the mason work was concerned, had been made. The only change or defacement not made, and still apprehended by Loomis, was from the cornice which had been made to go over the first story. The undisputed fact about that is that it was too long by three inches, and would, if it could have been put up as it was, have extended three inches over Loomis' store. It had been made by mistake longer than the plan. One witness says: "It hit the projecting brick; it wouldn't fit the work some way." It was accordingly shortened, and that appears to have been required by the necessity of the case, though that necessity appears not to have been fully understood by Loomis. We come, then, to the question as to whether the judgment, or any part of it, in favor of the appellees can be sustained by reason of anything pertaining to this cornice. The appellees contend that the part allowed for attorney's fees can. Their position is based upon a fact which remains to be stated. They moved to dissolve the injunction, and a hearing was had upon the motion. The court overruled the motion, but made what it called a modification of the injunction, the order respecting it being in these words: "This injunction is so far modified as to permit the defendants' putting up a metal cornice on the first story, corresponding with the original plans and specifications, not extending beyond the center of the partition walls of said building." The appellees base their right to an attorney's fee, in part, at least, upon this so-called modification. Their position, if we understand it, is that this was a partial dissolution obtained as the result of

their motion, and hence they should be allowed the cost of making the motion.

We have some doubt whether the appellees were ever enjoined from putting up a cornice that should extend to the middle line of the partition wall. We discover nothing in the petition in the injunction case, and nothing in the evidence in this case, tending to show that Loomis ever had any objection to the appellees extending their cornice to such line. And when we look into the writ, it is by no means clear that it should be held to enjoin the appellees from doing so. They were enjoined from putting up a cornice that would deface or change the original style of architecture of the front wall of Loomis' store. Now they were not enjoined from extending the cornice to the middle line of the wall, unless extending it to such line would have the effect to deface or change the original character of the architecture of the wall. But whether it would have this effect we do not feel called upon to determine. If we should concede that it would, we should still be of the opinion that the appellees would not be entitled to recover for attorney's fees. The petition for the injunction is entirely silent in regard to the cornice. We have a case, then, where the writ is broader than the petition. In such a case we concede that the writ must be obeyed, even in that wherein it is broader than the petition. But the defendant in such case has a very simple remedy. His remedy is not by motion for dissolution, but for modification. *Richards v. West*, 3 N. J. Eq., 456; *Park v. Yorks*, 32 Howard, (N. Y.) Pr., 408. Such motion is to be determined by simple comparison of the writ and the petition. Now the appellees' motion was not a motion for modification. It did not contemplate a modification, but a complete dissolution. The attorney's services were rendered for that end, which was not reached. We think that there is no rule which would justify us in holding that the appellants became liable for the entire cost of such services. Whether there could have been an apportionment we need not determine. There was no attempt to make it.

Ford et al. v. Loomis et al.

If we should look at the modification as a partial dissolution, we should meet with substantially the same difficulty. There is, doubtless, a liability which may arise upon a partial dissolution. A liability was sustained in *White v. Clay's Ex'rs*, 7 Leigh, 68, which was a case of partial dissolution. But the liability was not for attorney's fees. It was of an entirely different character. The collection of a judgment was enjoined, and afterward the injunction was dissolved as to a part. It was held, and very properly, that the injunction bond given to secure the payment of the judgment could be enforced to the extent to which the injunction was dissolved.

Probably there might be a case where even attorney's fees would be allowable in case of partial dissolution, as where the motion should be for partial dissolution, and should be sustained as made. But it would not follow that, where a motion is made to dissolve the injunction as an entirety, and is only partially sustained, the plaintiff in the injunction suit would become liable for all the legal services rendered for the defendant upon the motion. We have to say, then, that the judgment rendered in favor of the appellees for \$70, as attorney's fees for services rendered upon the motion as a whole, cannot, we think, be sustained.

We have already seen that the injunction was served too late to prevent any mason work, and did not, therefore, delay the completion of the building. It follows, therefore, that the judgment for \$50 for delay on mason work, and \$12 for rental value of building, cannot be sustained.

REVERSED.

SUPPLEMENTAL OPINION.

ADAMS, J.—In a petition for a rehearing, our attention is called to the fact that Loomis' ownership embraced the second as well as the first story. We spoke of it as embracing only the first story. But the point has no materiality, and, having none, the obscure evidence concerning it was not carefully ex-

amined. The material fact is that the plaintiffs had built above Loomis' *part*; and that is equally true, though it embraced the second story. Of the evidence upon this point we made a very careful examination, and found that there was no conflict. It is true that, by reason of a clerical error, we said that the appellants contend that there is a conflict. We intended to say, and did say in the original draft, from which a copy was made for filing, that the appellants contend that there is no conflict.

The petition for rehearing discloses nothing, we think, which should change our view of the case. It must, therefore, be overruled.

BABCOCK ET AL. V. THE CHICAGO & NORTHWESTERN R'Y CO.

1. **Railroads: FIRE BY SPARKS FROM ENGINE: PRIMA FACIE EVIDENCE OF NEGLIGENCE.** Under the last clause of section 1289 of the Code, the fact of an injury resulting from fire caused by sparks escaping from an engine is *prima facie* evidence of negligence, which the defendant must rebut. *Small v. The C., R. I. & P. R'y Co.*, 50 Iowa, 333, followed.
2. ———: ———: **NEGLECT: CIRCUMSTANTIAL EVIDENCE TO PROVE.** The doctrine announced in *Gandy v. The C. & N. W. R'y Co.*, 30 Iowa, 420, that the fact of negligence on the part of a railway company in setting out a fire by sparks from an engine may be established by circumstantial evidence, *held* to apply as well where the testimony is offered by way of rebuttal, as where it is produced in making out the case in chief; and such evidence so introduced in this case was properly submitted to the jury.
3. ———: ———: **EVIDENCE.** From the fact that some of the conditions under which two fires set out at about the same place by sparks from a locomotive engine, one of which caught within the right of way of the defendant, were the same, it cannot be inferred that the other fire also caught within the right of way, and the admission of evidence of the similarity of such conditions, for the purpose of raising such inference, was erroneous.

62	593
78	306
62	593
83	276
63	593
88	237
63	593
90	151
62	593
102	29
62	593
136	185

ON REHEARING.

4. ———: ———: NEGLIGENCE: CONFLICT IN EVIDENCE: WHAT CONSTITUTE3. In an action against a railway company for damages caused by the negligence of the defendant in setting out a fire by sparks from its engine, the occurrence of the fire is, under the statute and the decisions of this court, *prima facie* evidence of negligence on the part of defendant. With this *prima facie* evidence on one side, and the direct evidence of defendant on the other side that it was not negligent, there arises a conflict, which it is the duty of the court to submit to the jury. Much more does such a conflict arise where, as in this instance, the *prima facie* case made by the occurrence of the fire is corroborated by circumstantial evidence of the defendant's negligence.

Appeal from Marshall Circuit Court.

SATURDAY, DECEMBER 15.

THIS is an action to recover damages for property destroyed by a fire set out by an engine on the defendant's road. There was a jury trial, resulting in a verdict and judgment for plaintiff for \$497.80. The defendant appeals.

Hubbard, Clark & Dawley, for the appellant.

James Allison and *Caswell & Meeker*, for appellees.

DAY, CH. J.—The defendant complains of the action of the court in refusing to instruct that, as a matter of law, the defendant had overcome the presumption, raised by the statute, of negligence, in cases where fire is set by locomotives, and in submitting to the jury the questions whether the defendant's engine was equipped with the best known appliances for arresting sparks and cinders; whether it was in good order, and was properly and skillfully run by the engineer in charge. It is insisted that there is an entire absence of conflict in the testimony that the engine was supplied with the best means of preventing the escape of fire, that it was in good order, and that it was properly handled.

The testimony of the employes of the defendant is to the effect that the engine was supplied with the very best contri-

vances as to ash-pans, spark-arresters and nettings; that they were examined both before and after the trip on which the fire was set out, and were found in good order, and that the engine was managed in a proper and skillful manner.

The evidence shows that the size of the meshes in the nettings is three-sixteenths of an inch. Before the enactment of the last clause of section 1289 of the Code, it was held that the setting of fire from an engine did not create a presumption of negligence on the part of the company, but that the burden of proving negligence was upon the plaintiff. *Gandy v. C. & N. W. R'y Co.*, 30 Iowa, 420. Under the last clause of section 1289 of the Code, it has been held that the fact of an injury resulting from fire caused by sparks escaping from an engine is *prima facie* evidence of negligence, which the defendant may rebut. *Small v. C., R. I. & P. R. Co.*, 50 Iowa, 338. Under this decision, the effect of the statute is simply to change the burden of proof.

It is evident, however, that the proof offered by the plaintiff, whether in chief to establish evidence *prima facie*, or to rebut the evidence of care introduced by the defendant, must of necessity, when it is directed to the condition of the defendant's engine, be of a circumstantial character. Ordinarily the plaintiff could not introduce witnesses who could testify from a personal knowledge of the condition of the defendant's engine.

In *Gandy v. C. & N. W. R'y Co.*, *supra*, the following language is employed: "But as, in the nature of the case, the plaintiff must labor under difficulties in making proof of the fact of negligence, and as that fact itself is always a relative one, it may be satisfactorily established by evidence of circumstances bearing more or less directly upon the fact of negligence, which might not be satisfactory in other cases free from difficulty and open to clearer proofs, and this upon the general principle of evidence, which holds that to be sufficient or satisfactory which

1. RAILROADS:
fire by sparks
from engine:
prima facie
evidence of
negligence.

2. —: —:
negligence:
circumstan-
tial evidence
to prove.

ordinarily satisfies an unprejudiced mind." 1 Greenl. on Ev. § 2. This principle is as applicable to a case where the testimony is offered by way of rebuttal, as where it is produced in making out the case in chief; for, in both cases, the plaintiff labors under the same difficulties. E. P. Thompson, on behalf of the plaintiffs, testified as follows: "I went there as soon as ever we got the fire out, and looked to see where it was done, and I was satisfied from the condition of the ground that it caught on the right of way, and I should think as much as five feet from the fence. I saw quite little chunks of cinders that looked fresh and bright, and I am sure there was no frost or rain on them. I would think some of them were as large as the end of my thumb, or perhaps the size of half a walnut. I would think from the appearance and surroundings that it was just burned. That was my judgment at the time. The little ashes from the grass lay there perfectly bright and dry. I don't know anything more than that. That was immediately around it, and there was a little place each way from it where the ashes were black and dead, which showed plainly there was rain or frost or snow on them, after they were burned. You could distinguish very readily the difference between the two, where they were fresh and where they were burned before."

The evidence shows that the defendant had burned over its right of way, but that, in places, unburned patches of grass 3. —: —: had been left. J. O. Chapman, a witness for the evidence. defendant, testified upon cross-examination that, if a spark half as large as a walnut should be thrown from an engine, burning so as to set grass on fire, he could not tell where it could have been thrown from, unless it came from the stack; that it could not come through the holes in the nettings, and if the damper was shut tight it could not have come from that, and that, if it came out of the stack, he would say as an expert that the nettings had given away. It is in evidence that the life of a netting does not exceed two months, and very often they wear out in much less time. There is no

evidence in the record, as we have discovered, how long the netting in question had been used. If the cinders referred to by the plaintiff came through the netting, it was not in good order when it returned from the trip, and if the defendant's witnesses are mistaken about the netting being in good order when the engine returned, it follows that absolute reliance is not to be placed upon their testimony that it was in good order when it went out. Now, clearly, it was a question of fact for the jury whether the cinders referred to by the plaintiff set out the fire. If they did, the jury would have been authorized to find from the testimony, either that the engine was not in good order, or that it was not skillfully managed. The court could not determine this question against the plaintiff, as a matter of law, or withdraw this evidence from the consideration of the jury. As bearing somewhat upon this question, see *Karson v. M. & St. P. R'y Co.*, 29 Minn., 12.

II. A. L. Mead, a witness on behalf of the defendant, testified that there had been several fires on Mr. Thompson's land, before the fire in question, and that these fires had an influence on the company in regard to exercising care about the right of way. The evidence further shows that the locality in question is on a grade of thirty-five or forty feet to the mile, that trains generally work steam pretty hard when they get to the foot of the hill, in order to strike the foot of the hill at good speed, and that sparks are thus emitted. Noonan, a witness for the defendant, on cross-examination, stated that there was a pile of fence boards by the right of way, which took fire, and that the fire spread from them, and burned the grass on the right of way, and ran into the field.

The plaintiff, Thompson, upon being recalled, testified that the fire referred to by Noonan occurred in April, 1879, about two months after the fire in question in this suit. Against the objection of the defendant, this witness was permitted to testify that there was no more grass up where this pile of boards lay, that caught fire on the right of way, than there

 Babcock et al. v. The Chicago & Northwestern R'y Co.

was down where the fire in question in this suit caught. It was a very controverted question in this case whether the fire caught on the right of way, or outside of the right of way on plaintiff's premises. This testimony could not possibly have any proper bearing upon the case, unless it would justify the inference, from the fact that it caught where there was no more grass than where the fire in question is supposed to have caught, that this fire also caught on the right of way. But the conditions under which fires are put out are so variant, that, from evidence that one caught on the right of way, no inference can properly be drawn that another did also. Besides, the evidence affirmatively shows that the conditions under which these fires caught were not the same, as the one occurring in April caught in a pile of lumber. This evidence was improperly admitted, and we cannot say that the defendant was not prejudiced by it. Referring to the other fires spoken of by the witness Mead, Thompson was permitted to testify, against the objection of the defendant, that all of them except one caught on the right of way. This testimony, we think, was properly admitted to rebut the testimony of Mead, that the frequency of the fires had an influence upon the company in regard to exercising care about the right of way. In view of what has been said, we do not deem it necessary to pass upon the other questions discussed by appellant. For the error in admitting the testimony above referred to, the judgment is

REVERSED.

OPINION UPON REHEARING.

BECK, J.—I. Upon defendant's petition, a rehearing was allowed in this case, and it has been again argued. Upon the reargument counsel insist, in effect, that there is no conflict upon the question of defendant's care, which, they claim, was established without contradictory proof, and that the circuit court upon this ground should have taken the case from the jury and directed a verdict for the defendant.

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negligence :
conflict in
evidence :
what consti-
tutes.

It is difficult to understand how it can be fairly claimed that there is an absence of evidence tending to show defendant's negligence, in view of the fact that, under the statute and decisions of the court, the occurrence of the fire is *prima facie* evidence of defendant's negligence. The fire itself is evidence of negligence. It is, however, only *prima facie* evidence. But it establishes negligence, which must be regarded as a fact until other contradictory evidence requires a different conclusion. There must of necessity be conflicting evidence in the case. The fire under the law is evidence of defendant's negligence; the good condition of the engine, the diligence of defendant's employes, and other facts, are evidence of defendant's care. Here is conflicting evidence which must be determined by the jury.

II. But, waiving this view, we think that, leaving out of consideration the *prima facie* evidence of defendant's negligence afforded by the fact of the fire, there is a conflict in the proof touching defendant's care.

The fact of the fire is not disputed. The point to be determined in the case upon the evidence is as to its origin, and whether it was through defendant's negligence. The fire was discovered within ten or fifteen minutes after defendant's train had passed the place. It started on the right of way of the defendant. These facts were all readily discovered. There could be little uncertainty as to either. It is not shown that another engine passed after the train just referred to, and before the fire was discovered. Fresh cinders—that is, cinders recently thrown from the engine, some of them the size of the end of a man's thumb, were found at the very place where the fire started. The character of these cinders, and that they were recently burning coals, was readily determined by their appearance. These circumstances and facts are all proper to be considered in determining the origin of the fire. It cannot be doubted, and is not denied, that cinders of the size of those found at the place could not come from an engine having sufficient netting to prevent the spread

of fire. If they were thrown from the engine, then was defendant negligent. The facts we have recited show that the cinders were thrown from the engine passing just before the fire. These facts tend to show that the netting of the engine was not in good order.

But there was direct evidence tending to show that the netting was in good order. Defendant's employes so testify. Here is a direct conflict. The jury, under the rules of the law, are to determine which shall outweigh—this direct evidence, or the circumstances we have above stated.

Counsel insist "that there is no conflict in the testimony that the engine was supplied with the best means of preventing the escape of fire, was in good order, and that it was properly handled. The testimony of defendant's employes is uniform to this effect, and shows that the engine was examined just before and just after it set out the fire." It may be admitted that all the direct evidence was on the defendant's side. But there were contradictory circumstances on the side of plaintiff. And it is a thing of frequent occurrence that circumstances given in evidence overcome direct testimony. It cannot be said that, on the question of defendant's negligence, there was no conflict of evidence.

The opinion first filed in the case states that there was no evidence showing how long the netting had been in use. This is a mistake, it being shown that the netting had been used for two weeks. But, on the other hand, it is proved by one of defendant's own witnesses, who was in its employment in repairing engines, and was familiar with the subject, that in some instances nettings wear out in ten or fifteen days. But it is shown that they are ordinarily sufficient for six weeks or two months.

We remain satisfied, after the reargument, with our former opinion, and adhere to it.

BAYLESS v. POWERS, ADM'R.

1. **Estates of Decedents:** COLLECTION OF JUDGMENT AGAINST DECEDENT: STATUTE OF LIMITATIONS. Where a judgment has been rendered against a decedent in his lifetime, which the personal estate is insufficient to pay, an action may be commenced to enforce the payment of the judgment by the sale of the real estate. Code, § 3092. But collection must first be sought out of the personal estate; and, for the purpose of such collection, the judgment must be clearly "stated, sworn to and filed," as a claim against the estate, the same as any other claim. If filed as a claim of the fourth class, and not approved and allowed by the administrator, it must be proved, on notice to the administrator, before the court, within twelve months of the giving of notice of the appointment and qualification of the administrator. Plaintiff's claim in this case, founded on such a judgment, not having been proved within the twelve months, *held* barred by the statute of limitations.

Appeal from Allamakee Circuit Court.

SATURDAY, DECEMBER 15.

IN June, 1877, the plaintiff recovered a judgment in the district court against Malachi Powers, who died in September, 1878, and the defendant was appointed administrator of his estate. Notice of his appointment and qualification as such was given October 20, 1878. In January, 1879, the plaintiff filed a certified transcript of said judgment with the clerk of the circuit court, as a claim against the estate, and the same was entered by said clerk in the list of claims. But the transcript was not entitled as against the estate or the administrator, nor was the same verified until January 30, 1883.

In October, 1880, the plaintiff commenced a suit in equity, in which he asked that the said judgment be declared a lien on the decedent's real estate. This action was withdrawn in November, 1880.

In February, 1883, notice of "hearing upon said claim, and a copy thereof, was served upon said administrator, returnable to the February term, in 1883, of the circuit court."

Bayless v. Powers, Adm'r.

The estate at that time had not been settled. Upon the claim coming on to be heard, the plaintiff offered to amend the same by entitling it "Edwin Bayless, as administrator of Malachi Powers, deceased," which the court refused to allow. The defendant objected to the allowance of the claim, on the ground that it had not been filed against the estate, and because it was barred by the statute of limitations. The cause was submitted to the court, and it was held that the claim was barred by the statute, and the court refused to allow the same as a claim against the estate, and the plaintiff appeals.

Dayton & Dayton, for appellant.

L. E. Fellows, for appellee.

SEEVERS, J.—When a judgment has been rendered against a decedent in his life time, which the personal estate is insufficient to satisfy, an action may be commenced to enforce the payment of the judgment by sale of the real estate. Code, § 3092.

This section implies that such a judgment must be paid out of the personal estate in the first instance. But, before this can be done, it must be filed and allowed as a claim against the estate.

Claims against an estate must be "clearly stated, sworn to and filed." Code, § 2408. The administrator may approve and allow them. If he does not do so, they must be heard and allowed by the court, before they can be regarded as claims against the estate which the administrator is required to pay out of the proceeds of the personal estate. Code, § 2411.

The plaintiff's judgment, in so far as it can be regarded as a claim to be paid out of the personal estate, must be regarded as belonging to the fourth class. As to such, the statute provides that, if they are not "filed and proved within twelve months of the giving of the notice of the appoint-

Teabout v. Roper & Co.

ment and qualification of the administrator, they are forever barred, unless the claim is pending in the supreme or district court, or unless peculiar circumstances entitle the claimant to equitable relief." Code, § 2421.

If the claim can be regarded as filed, no notice was served on the administrator, or attempt made to have it established by the court, until February, 1883—more than four years after notice had been given of the appointment and qualification of the administrator. Nor was the claim verified as required by the statute. As no equitable circumstances exist which it is claimed excuse the delay, we are of the opinion that the claim is barred, and, therefore, the judgment of the circuit court must be

AFFIRMED.

TEABOUT V. ROPER & CO.

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100	382
62	603
137	030

- Judgment by Default: ACTION TO SET ASIDE: "UNAVOIDABLE CASUALTY OR MISFORTUNE": FACTS NOT CONSTITUTING.** Where an original notice of an action is duly served upon a defendant, a married woman, she must be presumed, in the absence of evidence of mental incapacity, to understand the object and purport of the notice, and how her rights are affected thereby; and where, as in this case, she gave the copy of the notice to her husband, claiming that she did so upon the supposition that it did not relate to her individual rights, and the husband neglected to defend, and thus judgment by default was rendered against her, *held* that she could not have the judgment set aside on the ground of unavoidable casualty or misfortune, under sections 3154, 3157, 3158 of the Code.

Appeal from Winneshiek Circuit Court.

SATURDAY, DECEMBER 15.

THE defendants recovered a judgment against the plaintiff by default, and this action was brought to set the same aside, under sections 3154, 3157 and 3158 of the Code, on the ground

of "unavoidable casualty or misfortune," which prevented the plaintiff from defending the action to which it is alleged she had a good defense. The court held that the plaintiff was not entitled to the relief asked, and she appeals.

L. Bullis, C. Wellington and Brown & Portman, for appellant.

Cooley & Akers, for appellees.

· SEEVERS, J.—Notice of the prior action was duly served on the plaintiff, and she testified that she did not suppose it concerned her individually, and she therefore gave the same to her husband, and failed to defend the action; that about the same time many other notices and papers were served on her, which she gave her husband, and in which she was not individually interested; that in business matters she relied on her husband, and that she had but little business experience; that she did not read the notice, and, if she had believed the plaintiffs in the action were trying to make her real estate liable, she would have defended.

The return of the sheriff on the notice showed that he had read the same to the defendant. The notice stated that the relief asked in the petition was that a certain lien of the plaintiffs in the action upon certain real estate in Winneshiek county be decreed superior and prior to the interest of the present plaintiff, and that a certain deed to said premises from Francis Teabout (plaintiff's husband) to her be decreed null and void. In another action, commenced by Ray & Co. against the plaintiff, she employed an attorney to defend for her. The plaintiff has been married forty-six years, and, therefore, is well advanced in life. But there is no evidence tending to show that her mental faculties are impaired, or that she is in bad health. Nor is it claimed that she is not capable of understanding business matters. It must be assumed that she knew, or was bound to know, when the notice was read to her, that her individual rights were concerned in

Hintrager v. Kiene et al.

the action; that it was brought to set aside a conveyance of real estate made to her by her husband, and to enforce a lien thereon.

Ordinarily, persons capable of acquiring property in any manner known to the law, have sufficient capacity to take care of and defend the same from attacks of a legal nature. But the incapacity of the plaintiff has not been shown. The most that can be said is that the plaintiff trusted her husband to see that her rights were protected, and he failed to do so. But his negligence, or the failure of the plaintiff to personally attend to the business, cannot be said to be unavoidable casualty or misfortune.

AFFIRMED.

HINTRAGER V. KIENE ET AL.

1. **Tax Deed: ACTION TO QUIET TITLE UNDER: PRESUMPTION THAT TAX WAS DULY LEVIED: EVIDENCE TO REBUT.** In an action to quiet the title to a lot under a tax deed, made pursuant to a sale for a special tax levied by a city for sidewalk purposes, the tax deed was *prima facie* evidence that the tax was duly levied; but this presumption was fairly rebutted where it appeared that, under the charter and ordinances of the city, the levy, if made, should appear of record in a book kept in the office of the city recorder for the purpose of showing the proceedings of the city council, and such book, being produced, duly authenticated and unmutilated, and covering the time when the levy should have been made, contained a record of certain action of the council in relation to the sidewalk in question, but no record of the levy of the tax on which the tax deed was based. It was not necessary, to rebut the presumption raised by the deed, to show also that a certain "minute book," which might have contained a memorandum of the levy, did not; as that was a book in the nature of a private memorandum, not provided for by law.
2. ———: ———: **INCOMPETENT EVIDENCE OF LEVY.** In such case, a paper purporting to be a resolution of the city council for the levy of the tax in question, indorsed "adopted" in the handwriting of the city recorder at the time, is not competent evidence of the levy, not being such a record as the law provides.
3. ———: ———: **EVIDENCE OF DEFENDANT'S TITLE.** While it is provided by statute that "no person shall be permitted to question the title acquired by a treasurer's deed, without first showing that he, or the person under whom he claims title, had title to the property at the time of

62	606
88	342
63	606
93	744
63	606
96	717
63	606
108	217
63	606
110	523
63	606
119	287
62	606
142	533

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the sale," yet, where the persons questioning the tax title are allowed to testify that they were the owners of the property at the time of the sale, and are not required to produce the record evidence of their title, this is a sufficient basis for the introduction of other evidence assailing the tax title.

UPON REHEARING.

4. **Practice in Supreme Court:** PRESUMPTION IN FAVOR OF COURT BELOW. Every reasonable presumption is to be entertained in favor of the ruling of the court below; and where a judgment against plaintiff for costs was erroneous only upon the supposition that defendant paid certain money into court *after* a certain date, and it does not appear from the record at what date the money was paid, the judgment cannot be disturbed.

Appeal from Dubuque Circuit Court.

SATURDAY, DECEMBER 15.

ACTION to quiet title to lot 245 in the city of Dubuque. The plaintiff claims under a tax deed executed to him by the treasurer of the city of Dubuque, in pursuance of a tax sale purporting to be made upon a special tax for laying a plank sidewalk in front of the lot. The defendant, Kiene, claims to be the owner in fee simple of the south half of the lot, and the defendant, Zumhoff, of the north half. They both deny the validity of the tax sale, and deny that there was ever any levy of the alleged special tax; and they ask that their respective titles be quieted. Decree was rendered for the defendants. The plaintiff appeals.

Robinson & Powers, for appellant.

Fouke & Lyon and *McCeney & O'Donnell*, for appellees.

ADAMS, J.—The plaintiff introduced in evidence a tax deed, which purported to be executed in pursuance of a tax sale, made for a special tax levied in 1868. The deed thus introduced became by statute *prima facie* evidence that the levy was made as therein recited. So far there is no controversy. After the introduction of the tax deed by the plaintiff, the defendants introduced evidence for the purpose of showing that

1. TAX deed :
action to
quiet title
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sumption
that tax was
duly levied :
evidence to
rebut.

no levy was in fact made. The controversy arises upon the question as to whether the defendants' evidence was sufficient to establish such fact.

If the levy was made, the action of the city council in making it should appear of record in a book kept in the office of the city recorder for the purpose of showing the proceedings of the city council. City Charter, Sec. 12, Laws of 1857; Revised Ordinances of 1861. It may be that the absence of all record of a levy would not conclusively show that none was made. But absence of the record of a levy is a circumstance tending to show that none was made, and it may be sufficient to overcome the *prima facie* evidence of the deed. *Early v. Whittingham*, 43 Iowa, 167. It is true that the proof that certain books do not show a record of a levy would not necessarily be sufficient evidence that there is no record. It would not be sufficient, if the books produced were mutilated, *Easton v. Savery*, 44 Iowa, 654; or if the books produced did not appear to be authentic or sufficiently identified, *Genther v. Fuller*, 36 Iowa, 606; or if for any reason there was ground for supposing that there might be other books. In the case at bar, a book was introduced, which appears without question to be the record of the proceedings of the city council for the year 1868. The plaintiff himself, indeed, relies upon this book in part. It shows certain action of the council in relation to the sidewalk in question, but there is no pretense that it shows a levy of the special tax. The plaintiff insists that there is no sufficient evidence that it does not. But we think that there is. The recorder testified in substance that he had made an examination and found no record of a levy. It is true, his attention appears to have been confined to the year 1868, and it is suggested that perhaps there was a levy made before that time. But the deed recites no levy, except as made in 1868, and, what is more, the proceedings shown by the book, and relied upon in part by the plaintiff, were had in 1868, and were proceedings preliminary to a levy. We think that there was sufficient

evidence of the absence of the record of a levy to raise the presumption that there was no levy, and to overcome the *prima facie* evidence of the deed. We ought, perhaps, to say in this connection that the plaintiff contends that there was evidence showing that there was another book which might have contained the record of the levy, and which book was not produced, and does not appear to have been examined. The book referred to is called a minute book. But this minute book does not appear to be a book provided for by law, but to be in the nature of a private memorandum. It was not necessary, we think, to show that such book did not contain a record of the levy.

The plaintiff contends, however, that there was some affirmative evidence of a levy, aside from the deed.

A certain paper was introduced in evidence, purporting to be a resolution, dated November 10, 1868, and declaring
2. — : — : that a tax of \$5.90 is levied upon the lot in
incompetent
evidence of
levy. question to pay for a sidewalk. On the back of
the paper was written the word "adopted." Evidence was introduced showing that the word "adopted" was in the hand writing of one Glab, who was city recorder at that time.

But in our opinion this paper was not competent evidence. It was introduced as a record of the proceedings of the council. But it was not such record as the law provides, to say nothing of its want of due authentication.

It is said, however, by the plaintiff that, even if the fact is that he has no title, he is nevertheless entitled to a decree
3. — : — : that he has title, because the defendants have
evidence of
defendant's
title. failed to prove that they, or those under whom
they hold, had title at the time of the tax sale.

This position is based upon a provision of statute: "No person shall be permitted to question the title acquired by a treasurer's deed, without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale." Code, § 897; Revision, § 784. Under

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this provision, it was doubtless the plaintiff's right to insist that the defendants should not be allowed to introduce evidence assailing his tax title, without first introducing evidence sufficient to show *prima facie* that they, or those under whom they claim, were the legal or equitable owners of the property at the time of the sale.

On this point, both the defendants testified that they were the owners of the property claimed by them respectively. This testimony was admitted without objection, and was, we think, under the ruling in *Brandirff v. Harrison County*, 50 Iowa, 169, sufficient to make a *prima facie* case. In that case the court said: "It is urged that the plaintiffs did not show by proper evidence that they were the owners of the land upon which the tax was levied. They were permitted to state under oath that they were the owners, and were not required to produce record evidence. This, we think, was sufficient."

Some other questions are presented, but, in the view which we have taken of the case, the consideration of them is unnecessary. In our opinion the decree of the circuit court must be

AFFIRMED.

SUPPLEMENTAL OPINION.

BY THE COURT.—A petition for rehearing having been filed, we have re-examined the case in the light of it, but have not been able to reach a different conclusion from that reached in the original opinion. One point, however, urged upon the hearing, and again urged in the petition for a rehearing, we omitted to consider. It is insisted that the court below erred in rendering judgment against the plaintiff for costs. This position is based upon the alleged fact that the court found that there was due the plaintiff from the defendant, Zumhoff, a certain sum for taxes paid, and no offer to pay the same had

4. PRACTICE
in supreme
court : pre-
sumption in
favor of
court below.

been made prior to the commencement of the action. The plaintiff cites and relies upon *Corning Town Co. v. Davis*, 44 Iowa, 623, and *Poindexter v. Doolittle*, 54 Iowa, 52. The defendant, Zumhoff, denies that there was a finding that there was anything due from him.

All that we find in the decree upon this point is a recital in the following words: "The said Zumhoff now paying into court the sum of \$45.55 for the plaintiff's use." No judgment was rendered against Zumhoff for anything, nor was there any finding against him, unless the words quoted could be construed as a finding that Zumhoff admitted that the amount paid into court was due the plaintiff. But, conceding that the payment constituted such admission, and that the court so found, we do not think that there was any ground for rendering judgment against Zumhoff for costs.

The plaintiff in his original petition claimed title. The action was brought to quiet title. It was only by amendment to the petition on the day of trial that the plaintiff claimed anything for taxes paid. At what time Zumhoff paid into court the \$45.55 does not appear. If he paid it before any claim was made by the plaintiff for taxes paid, it would seem clear that there was no ground for rendering judgment against him for costs. Every reasonable presumption is to be entertained in favor of the ruling below.

The cases cited differ widely from the case at bar. In those cases the holder of the patent title was plaintiff, and no offer, or tender, or payment into court, was made at any time. We think that the petition for a rehearing must be overruled.

POOLE, GILLIAM & CO. V. JOHNSON.

1. **Redemption from Mortgage Foreclosure Sale: BY JUNIOR LIEN HOLDER NOT MADE A PARTY: TERMS OF.** One who buys property under a mortgage foreclosure holds title thereto, subject to the right of redemption by a junior lien holder not made a party to the foreclosure, upon his paying to the purchaser the amount of the mortgage debt, interest and costs, and taxes paid by the purchaser, and the value of all improvements made in good faith by the purchaser upon the premises, less the rents and profits of the premises while in the possession of the purchaser. But the purchaser may, before redemption, remove improvements made by him, if it can be done without injury to the premises; and in that case he can not recover their value from the redemptioner, nor can he be compelled to account to the redemptioner for the rents and profits arising from such improvements while remaining on the premises.

Appeal from Kossuth Circuit Court.

SATURDAY, DECEMBER 15.

ACTION in chancery to enforce the right of a junior mortgagee to redeem from a sale of the mortgaged premises upon a decree foreclosing a senior mortgage, on the ground that the junior mortgagee was not made a party to the proceeding foreclosing the senior mortgage. A decree authorizing redemption, upon the payment of a sum therein specified, was entered. Plaintiffs appeal.

George E. Clarke, for appellants.

Soper, Crawford & Carr, for appellee.

BECK, J.—I. Plaintiffs complain of the amount which the decree of the court in this case requires them to pay in order to redeem from the senior mortgage. Their request to redeem is hardly controverted by defendant. But plaintiffs insist that from the mortgage debt certain rents should be deducted, and it is insisted in argument that, after this is done, nothing will be due defendant. The facts are fully embodied in an agreed statement. Other evidence was introduced

upon the point of defendant's good faith in making improvements upon the premises and in removing them. We find the essential and controlling facts of the case to be as follows:

The defendant purchased the lot in question under the decree of foreclosure of a mortgage executed to him. Plaintiffs held a junior mortgage, and were not made parties to the proceeding foreclosing defendant's mortgage. Of their right to redeem there can be no question. We are required to determine the sum they must pay in order to redeem.

II. About four years after the sale of the mortgaged property upon the decree of foreclosure, and about three years after the sheriff's deed was executed thereon, defendant built upon one of the lots a small house "upon blocks," at the cost of \$400, and dug a well upon it. The house was rented at \$7 per month. Within twenty-two months after it was built, and after plaintiffs had commenced this suit, defendant removed the house to another lot, the mortgaged premises being left in the condition in which they were found by defendant when he entered into possession thereof under the sheriff's deed, except as to the well. Plaintiffs insist that defendant is to be charged, against the mortgage debt, the amount of the rents received by him up to the removal of the house, and the value of the rent of the house after its removal up to the date of the decree in this case. This claim was not allowed by the circuit court, but plaintiffs were required to pay, in order to redeem, the amount of the debt, with interest and costs, together with the amount of taxes upon the property paid by defendant. We think the value of the rent of the lot, to the amount of \$12 or \$15, was deducted from the sums chargeable to the property. This conclusion is based upon our calculation made to determine the amount required to redeem. But the record is not clear upon this point, further than to show that the amount to be paid by plaintiff, as prescribed by the decree, hardly equals the full amount of the mortgage debt, interest and costs and the sum paid for taxes.

III. It cannot be doubted that a mortgagee in possession

under a foreclosure of the mortgage must account to one entitled to redeem for the rents and profits of the mortgaged premises received by him while he has held possession. *Barrett v. Blackmar*, 47 Iowa, 365; *Ten Eyck v. Casad and Rowley*, 15 Id., 524. But this rule is modified by other doctrines which we will proceed to state; and under them it is not applicable to the case at bar.

IV. One who has acquired possession of mortgaged premises, in the belief that he holds the title under foreclosure proceedings, is entitled to claim, upon redemption being made under the mortgage, the value of improvements made by him. *Putman v. Ritchie*, 6 Paige, 390; *Benedict v. Gilman* 4 Paige, 58; *Troost v. Davis*, 31 Ind., 34; *Roberts v. Fleming*, 53 Ill., 196; *Green v. Dixon*, 9 Wis., 532; *Bacon v. Cottrell*, 13 Minn., 194; *Vanderhaise v. Hugues*, 2 Basl., 410; *Miner v. Beekman*, 50 N. Y., 337; *Jones on Mortg.*, (2nd ed.), § 1128; *Harper's Appeal*, 64 Pa. St., 315.

The evidence shows that defendant, when he built the house, in good faith believed that he had a valid title to the property, and that no right of redemption existed in plaintiffs or others.

V. Improvements made as contemplated in the rule above stated may be removed, if that can be done without injury to the soil, the premises being left in the condition they were in when possession was taken. *Winship v. Pitts*, 3 Paige, Ch., 259; 1 Hilliard on Mortgages, p. 471, and notes. See also pp. 461, 466, and notes.

The removal of the house by defendant did not injure the premises by leaving them in a condition different from that in which they were found by defendant when he built the house.

VI. Plaintiff, being entitled to remove the house, or to compensation therefor in case he had permitted it to remain, ought not to be charged with rents realized by him from it. These rents were not paid him for the use of the land, but for the use of the house, which, under the rules above stated, the law regards as his own property. The plaintiffs acquired no

The Assignment of Stewart & Aiman.

lien upon or right to it in any form. Defendant simply received rents for his own property which he had the right to remove, or, if he did not do this, to recover from plaintiffs its value when they sought to enforce their right to redeem. He cannot be charged in this case with this rent.

No other questions arise in the case which we are required to determine. The decree of the circuit court is

AFFIRMED.

THE ASSIGNMENT OF STEWART & AIMA.

1. **Partnership: ASSIGNMENT FOR BENEFIT OF CREDITORS: INDIVIDUAL INDEBTEDNESS OF PARTNER: FACTS NOT CONSTITUTING.** S. & A., who were partners, borrowed of a bank a sum of money, for \$1,500 of which they gave a note signed by them individually and endorsed by another, and for the residue they gave the notes of their firm. The \$1,500 was designed to be used, (as the bank knew at the time,) and was used, to pay the individual indebtedness of S., and S. was charged with the amount on the firm books. There was at this time no evidence that the firm was insolvent. Afterwards the notes were all taken up, and firm notes, secured by chattel mortgage, given for the whole loan. S. & A. subsequently made an assignment for the benefit of their creditors:—*Held* that the assignee was bound to pay the whole amount of the chattel mortgage out of the assets of the firm, and that the objection of the creditors that a portion thereof was the personal indebtedness of S. could not be sustained.

Appeal from Buchanan Circuit Court.

SATURDAY, DECEMBER 15.

STEWART & AIMA, a mercantile firm, made an assignment of their property to R. Stewart for the benefit of their creditors. The assignee made a report to the circuit court, showing, among other things, that he had paid a claim against the assignors for the sum of \$7,340, secured by notes and a chattel mortgage upon the property of the firm, to the First National Bank of Independence. To this report certain creditors

The Assignment of Stewart & Alman.

of the firm objected, on the ground that \$1,700 of the claim was the amount of the individual indebtedness of one of the partners, Stewart, and asked that the assignee be required to account for that sum. An issue was joined upon this objection, and a trial thereof was had before the circuit court. The objections of the creditors to the assignee's report were overruled, and the report of the assignee was approved. The creditors appeal.

Ransier & Bruckart and N. W. Bliss, for appellants.

Lake & Harmon, for appellee.

BECK, J.—I. the evidence shows that the assignors borrowed of the bank the amount of money secured by the chattel mortgage. At the time the loan was effected, notes were given, one of which—for \$1,500—was signed by the parties individually, and endorsed by another person. The other notes were signed by the firm. Fifteen hundred dollars of the amount so borrowed were applied to the payment of an individual debt of one of the partners, Stewart, the other partner assenting thereto. With this sum Stewart was charged upon the books of the firm. The officer of the bank, with whom negotiations were made for the loan, understood the purpose for which the parties intended to use the money. There is no evidence that the firm was insolvent at this time. Subsequently the notes first given, including the note for \$1,500, were taken up, and the firm notes were given in their place, which were secured by the chattel mortgage. The creditors insist that the notes, to the extent of \$1,500 and interest thereon, all amounting to \$1,700, constitute a personal indebtedness of Stewart, which ought not to be paid by the assignee until the creditors of the firm have been paid.

II. That the firm became bound for the amount in controversy cannot be doubted. That the notes, both those first given and subsequently executed, were executed with the consent of both partners, is not denied. That they are based

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upon a sufficient consideration, and are not tainted with fraud, must be admitted; and that the firm could not successfully resist their payment will not be claimed. If the claim and security therefor were valid against the assignors, they may be enforced against the assignee. Upon the payment of the money to Stewart's creditors, Stewart became bound for the amount to the firm, and, as we understand the record, he is charged with that amount upon its books. If the transaction was in good faith—with no purpose to defraud the firm's creditors—it must be upheld. The knowledge possessed by the bank officer of the purpose of the partners as to the appropriation of the money, in the absence of notice of the firm's insolvency, does not affect their rights, for, as we have said, the note in question was valid as against the firm. In our opinion the circuit court rightly ruled in overruling the objections to the assignee's report, and in entering an order approving it.

AFFIRMED.

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1110 81

**THE IND. DIST. OF UNION V. THE IND. DIST. OF CEDAR
RAPIDS ET AL.**

1. **School Districts: BOUNDARIES: POWER OF COUNTY SUPERINTENDENT TO CHANGE.** A county superintendent of schools has no authority to detach territory from one independent school district and annex it to an adjoining one, unless, by reason of streams or other natural obstacles, the inhabitants of the territory so detached cannot, with reasonable facility, enjoy the advantages of the schools in the district from which the territory is sought to be detached, nor unless the directors of the district to be deprived of the territory consent to the change.
2. ———: **CHANGE OF BOUNDARY: VOID ORDER OF COUNTY SUPERINTENDENT: CURATIVE ACT OF LEGISLATURE: HOW FAR VALID.** The legislature may by a curative act validate a void order of a county superintendent changing the boundaries of school districts, in a case where a general law could not be made to apply—following *State v. Squires*, 26 Iowa, 340; but such act cannot be allowed to operate to deprive a school dis-

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trict, from which territory is detached by such order, of taxes which are levied and collectible before the curative act is passed; for, under the doctrine of *City of Dubuque v. Ill. Cent. R. Co.*, 39 Iowa, 56, such district has acquired in such taxes a vested right, of which it cannot constitutionally be deprived.

Appeal from Linn District Court.

SATURDAY, DECEMBER 15.

THE plaintiff's petition in substance alleges that certain territory, comprising four hundred and eighty acres, is included within the boundaries of plaintiff, and that, on the ninth day of April, 1881, the county superintendent of Linn county, without any power or authority, made an order detaching said territory from the plaintiff, and attaching it to the defendant; that the assessor of Rapids township, in which said lands are situated, listed and assessed said lands for taxation, for the year 1881, as lying and being situated in the Independent District of Rapids, instead of the Independent District of Union; that said Independent District of Rapids is demanding said taxes, and expects to receive them, and that the treasurer of said county, unless enjoined and restrained from so doing, will collect said taxes and pay them over to the treasurer of the board of directors of defendant. The plaintiff prays that the defendant, R. M. Jackson, treasurer, may be enjoined from paying over to the defendant any taxes levied upon the lands in the petition described, and that said order of the county superintendent may be decreed to be null and void, and of no force to detach said lands from plaintiff's boundaries. The defendant, amongst other defenses, sets up and relies upon a legalizing act of the legislature, approved March 17, 1882. The court entered a decree dismissing the plaintiff's petition, and plaintiff appeals.

Deacon & Smith, for appellant.

Mills & Keeler, for appellee.

DAY, CH. J.—I. The order of the county superintendent, detaching the territory in question from the plaintiff and attaching it to the defendant, purports to be made by virtue of authority vested in the county superintendent by a decision of this court in the case of *Eason et al. v. Douglass et al.*, 55 Iowa, 390. This case simply expresses the opinion that the county superintendent may change the boundaries of independent districts under the joint provisions of sections 1797 and 1806 of the Code. Section 1797 of the Code provides that in cases where, by reason of streams or other natural obstacles, any portion of the inhabitants of any school district cannot, in the opinion of the county superintendent, with reasonable facility enjoy the advantages of any school in their township, he may, with the consent of the board of directors of such district as may be affected thereby, attach such part of said township to an adjoining township. Section 1806 of the Code provides that independent districts shall be governed by the laws enacted for the regulation of district townships, so far as the same may be applicable. It follows that, if the county superintendent has jurisdiction over the change of boundaries of an independent district, two things are essential to the exercise of that jurisdiction, namely: the existence of streams or other natural obstacles, in the opinion of the county superintendent depriving a portion of the inhabitants from enjoying the advantages of any school in their township with reasonable facility, and the consent of the directors of the district to be affected by the order. It is conceded that the plaintiff is the district affected by the order in question. The evidence shows that the plaintiff's board of directors did not consent to the order of the county superintendent detaching the territory in question. The evidence also shows that there were no streams or other natural obstacles, as contemplated in section 1797 of

1. SCHOOL districts: boundaries: power of county superintendent to change.

The Ind. Dist. of Union v. The Ind. Dist. of Cedar Rapids et al.

the Code. It follows that the order of the county superintendent was without authority, and void.

II. The defendant, however, relies upon chapter 120 of the Nineteenth General Assembly, being an act to legalize

2. —: change of boundaries: void order of county superintendent: curative act of legislature: how far valid. the action of the county superintendent in question, approved March 17, 1882. The plaintiff insists that this act is unconstitutional. All of the objections to the act, except that which pertains to the depriving plaintiff of the taxes of 1881, are met and fully answered in *State v. Squires*, 26 Iowa, 340. Following that case, we hold that, in so far as the order of the county superintendent simply attaches the territory in question to the defendant, it was legalized by the curative act above referred to. This case differs from *Ind. School Dist. v. City of Burlington*, 60 Iowa, 500. The effect of the act drawn in question in that case was to amend the charter of the city of Burlington. Section 30 of the constitution provides that the general assembly shall not pass local or special laws for the incorporation of cities and towns. In *Ex parte Pritz*, 9 Iowa, 30, it was held that this section of the constitution prohibits the enactment of special laws for the amendment of acts of incorporation already in existence. It might well be that the legislature could not, by curing illegal acts already done, accomplish indirectly what it could not do directly. But the only inhibition of the constitution upon the passage of such an act as that now in question is, that all laws shall be general, in all cases where a general law can be made applicable. Constitution, Art. 3, § 30. That a general law could not be made applicable to the case now under consideration, was clearly shown in *State v. Squires, supra*. It is, therefore, no objection to this statute that it is a special law.

III. As to the right to collect the taxes levied upon the territory in question for the year 1881, a different question is presented. These taxes were assessed, and had become collectible, before the curative act in question was passed. We adopt the views and conclusions of

3. THE same as affecting taxes levied.

Owens et al. v. Hart.

BECK, J., in *City of Dubuque v. The Illinois Central Railroad Company*, 39 Iowa, 56, that a municipal corporation acquires a vested right in taxes levied, of which it cannot constitutionally be deprived. It follows that the curative act in question cannot be allowed to act retrospectively, so as to deprive the plaintiff of the right, which existed when the law was passed, to collect the taxes levied upon the territory in question for the year 1881. A decree will be entered restraining the treasurer of Linn county from paying to the defendant the taxes collected upon the territory in question for the year 1881, and requiring the payment of such taxes to the plaintiff. The decree dismissing the plaintiff's petition, in so far as it asks that the order attaching the territory in question to defendant be annulled, is approved.

REVERSED.

OWENS ET AL. V. HART.

1. **Homestead: SALE OF ON EXECUTION, WITHOUT PLATTING, VOID: ESTOPPEL OF OWNERS.** Where an officer holds an execution against a homestead and other lands, and the occupants have failed to select and plat the homestead, it is the duty of the officer to select and plat the same, as provided by § 1998 of the Code, and to exhaust the other property liable to sale before offering the homestead; and a failure so to do on his part will render the sale void. In such case, the owners are not estopped from maintaining an action to set aside the sale on the ground that they had notice of the sale, and raised no objection thereto at the time. As the execution itself gave notice to the officer that there were other lands liable, besides the homestead, the owners had a right to rely upon his doing his duty without notice or request from them. But the rule is otherwise where the officer cannot be charged with notice of other property, unless the same is pointed out by the execution defendants. See *Foley v. Cooper*, 48 Iowa, 376.

Appeal from Floyd District Court.

SATURDAY, DECEMBER 15.

ACTION in chancery to set aside a sheriff's deed of lands

sold upon an execution issued upon a decree foreclosing a mortgage. A demurrer to the petition was sustained. Plaintiffs electing to stand upon their petition, a decree was entered dismissing it, from which they appeal.

Bolton & Bolton, for appellant.

Ellis & Ellis, for appellee.

BECK, J.—I. The petition alleges that upon a special execution, issued on the decree of foreclosure of a mortgage conveying one hundred and twenty acres of land, all of the property was sold *en masse* to defendant, and a sheriff's deed for the lands was accordingly executed. It is also alleged that forty acres of the land was the homestead of plaintiffs, and was occupied by them as such before the execution of the mortgage; that they never released their homestead rights to the forty acres; that no plat of their homestead was made by themselves, nor was it done by the sheriff, who failed to sell or offer to sell, the other land before selling the homestead; that the lands other than the homestead were of sufficient value to satisfy the decree of foreclosure; that there were no other liens upon any of the lands, and that plaintiffs were not present at the sale, and had no notice that the sheriff would offer the lands for sale upon the execution *en masse*. A demurrer was sustained to the petition.

II. Code, § 1993, is in the following language: "The homestead may be sold for debts created by written contract, executed by the persons having power to convey, and expressly stipulating that the homestead is liable therefor; but it shall not in such case be sold, except to supply the deficiency remaining after exhausting the other property pledged for the payment of the debt in the same written contract." Section 1998 provides that the owner of the homestead, or the husband or wife, may select the homestead and cause it to be platted, and that "a failure in this respect does not leave the homestead liable, but the officer having an execu-

tion against the property of such a defendant may cause the homestead to be marked off, platted and recorded, and may add the expense thence arising to the amount embraced in the execution."

III. We have held, under these provisions, that the failure of the officer holding an execution to select and plat a homestead, when the occupants have failed to do so, renders the sale void. *White v. Rowley*, 46 Iowa, 680; *Linscott v. Lamart et al.*, Id., 312. This rule applies whether the execution be issued upon a judgment at law or upon a decree foreclosing a mortgage. The provisions of the statute above quoted, upon which the rule is based, are intended to protect the homestead from sale upon an execution until other real estate of the occupant has been made subject thereto. Their language and spirit include sales made upon decrees foreclosing mortgages, as well as upon general executions issued upon judgments in other cases.

IV. Counsel for defendant insists that this case is within the rule of *Foley v. Cooper et al.*, 43 Iowa, 376, under which plaintiffs cannot now defeat the sheriff's deed, for the reason that they had notice of the sale, and raised no objection thereto when it was made. This case is distinguishable from *Foley v. Cooper et al.*, upon these considerations. In this case the decree and execution describe the property subject to sale. The sheriff must take notice of the occupancy of a part of the land as a homestead, and he is required by the statute, without demand on the part of the defendants in execution, to select their homestead. The plaintiffs, therefore, were authorized to presume that the sheriff would do his duty in the selection of the homestead, without any act on their part. The notice they had of the sale did not, therefore, require them to be present at the sale, or do any other act, in order to preserve their homestead rights. In *Foley v. Cooper et al.*, the judgment and execution did not disclose that the defendant had other property than the homestead, which, by the terms of the judgment, was made subject thereto. The

Owens et al. v. Hart.

sheriff had no notice, therefore, that defendants had other property which ought to be exhausted first. The defendants, therefore, upon receiving notice of the sale, were required to make known to the sheriff the fact that they had other property, and give him a description thereof, or such information that he could levy upon it. It is plain that the defendants in execution in that case were required to do some act upon receiving notice of the sale, in order to protect their homestead. If they neglected to act, they ought not to complain. In this case they were required to do no act after notice of the sale. The notice and their silence, therefore, do not estop them.

The silence of plaintiffs cannot raise a presumption that they assented to the sale *en masse*, for the reason that they were authorized to presume that the law would be complied with by the sale of the homestead last. They cannot be presumed to assent by silence to what they had no reason to believe would occur. Now, this is so, even if it could be presumed that a sale *en masse* was beneficial to them, and a separate sale would have been prejudicial to their interests. They knew the course the law prescribed; their silence indicated that they desired it to be followed.

In *Foley v. Cooper et al.*, the defendants in execution knew that, unless they indicated other property to be sold before their homestead, it would be first sold. Such was the course of the law, and to change it they must do some act. In that case notice of the sale demanded response; in this case it did not. The effect of silence in the respective cases is different.

We reach the conclusion that the district court erred in sustaining the demurrer to plaintiff's petition.

REVERSED.

SCHAEFERT V. THE CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.

- | | |
|------|-----|
| 62 | 624 |
| 80 | 176 |
| 62 | 624 |
| 89 | 79 |
| 62 | 624 |
| 91 | 660 |
| 62 | 624 |
| 98 | 572 |
| 100 | 490 |
| 62 | 624 |
| 103 | 317 |
| 62 | 624 |
| 107 | 294 |
| 62 | 624 |
| 114 | 95 |
| 62 | 624 |
| 1125 | 656 |
1. **Railroads: COLLISION AT HIGHWAY CROSSING: CONTRIBUTORY NEGLIGENCE DEFEATS RECOVERY.** In an action for damages caused by a collision of defendant's train with plaintiff's team at a highway crossing, although defendant may have been negligent in not giving the usual signals, yet plaintiff cannot recover, if the negligence of the person driving the team contributed materially to the accident.
 2. ———: ———: **CONTRIBUTORY NEGLIGENCE: FACTS CONSTITUTING.** Where a person traveling on a highway, and approaching a known crossing of a railway track, with knowledge that the view of an approaching train is to an extent obstructed, heedlessly permits his team to trot over the highway, and makes no effort to look or listen for an approaching train for a distance of eighteen rods from the track, he is guilty of such contributory negligence as will prevent him from recovering, if a collision occurs, provided there are no circumstances which are calculated to distract his attention.
 3. ———: **SOUNDING WHISTLE AT CROSSING: NEGLIGENCE.** Where an engineer is approaching a highway crossing with his train at a rapid rate, and, when near the crossing, but as soon as it is possible, he sees a team approaching the track, and that a collision will certainly occur unless something is done immediately to prevent it, the natural and usual thing to do is to sound the whistle, and in so doing he is not guilty of negligence, though the sound of the whistle, by frightening the horses, may possibly contribute to the collision.
 4. **Practice in Supreme Court: ASSIGNMENT OF ERRORS: DEGREE OF PRECISION REQUIRED.** Where the assignment of errors clearly indicates the instructions asked and refused, and that the court erred in refusing them, this is sufficient, without pointing out more particularly the error in the ruling.

Appeal from Clayton Circuit Court.

SATURDAY, DECEMBER 15.

THE plaintiff's minor son, when driving a team of horses, hitched to a wagon, on a highway, attempted to cross the defendant's road at the crossing. The team was struck by a passing train, and the plaintiff's son killed. To recover for the services of his son during minority, and for the value of the horses, harness and wagon, this action was brought.

The ground of recovery stated in the petition is the negli-

Schaefer v. The Chicago, Milwaukee & St. Paul R'y Co.

gence of the defendant. Trial by jury, verdict and judgment for the plaintiff, and defendant appeals.

Noble & Updegraff and *J. O. Crosby*, for appellant.

Stoneman & Chapin and *Robert Quigley*, for appellee.

SEEVERS, J.—The railway approaches the crossing on a curve in a northeasterly direction. The highway runs north and south. The plaintiff resides north of the railway, and from such residence the plaintiff's two minor sons, with a wagon and team, started to cross the railway track. Both were seated in the wagon, on which was a hay or straw rack.

The deceased son was driving, and the other son, Ernest, was seated on the right hand side of the wagon. Twenty rods distant from the crossing there is a gate on the highway. At from one to two rods south of the gate the team was stopped for the purpose of listening for the train. It could not be seen from this point, because of an intervening hill and growing corn, or, if this be not true, there was a conflict in the evidence in relation thereto.

Between the place where the stop was made and the track, an approaching train could not be seen from the highway, except at a place about five rods north of the track. If this is not true in fact, the jury were warranted in so finding. From the place where the team was stopped there was a descent in the highway, but, at the five rod point, there was no difficulty, so far as the descent in the highway was concerned, in stopping the team, and at such place a coming engine could be readily seen. When the team started from where it had been stopped near the gate, the horses were allowed to trot "pretty fast," or "quite fast," or "pretty good," as the witness who saw the transaction testified, and no stop whatever was made until the horses were quite near the track, when the engine was seen, and when the attempt was made to check them. The evidence is such that the jury might well find that the horses

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had been in fact stopped when the whistle was sounded, and that they made a spring forward, and the wagon and horses were struck by the engine at about the whipple trees.

The plaintiff's deceased son had during the spring worked as a section hand for the defendant, and had ceased to so work for a time in order to help his father during harvest. When so working for the defendant, the deceased boarded at his father's. There is no conflict in the evidence in relation to the foregoing facts, and the jury found, in answer to a special interrogatory, that there was "a place four or five rods west of the railway track and crossing, about the foot of the hill, where plaintiff's son, Fred., could have seen the train approaching, if he had stopped and looked." The evidence was conflicting as to whether defendant's employes sounded the whistle or rang the bell when the train was approaching the crossing.

It will be conceded that the jury could well find that they did not do so. Although the defendant may have been negligent in not giving the usual signals, this will not warrant a recovery, if the driver of the team was also negligent; that is, if his negligence materially contributed to the accident. This must be regarded as the settled doctrine in this state.

The plaintiff's son, while working for the defendant and boarding at home, must have acquired full information as to

2. —: —: the crossing, and the obstacles in the way of seeing
 contributory negligence: an approaching train from the highway. As there
 facts constituting. is no evidence to the contrary, it must be pre-
 sumed that he was in full possession of the senses of hearing
 and seeing, and that he was possessed of ordinary intelligence.
 He, therefore, could not possibly be ignorant in relation to
 all the facts as to the crossing. If the jury had found other-
 wise, the finding should have been promptly set aside. He
 knew he was about to cross the track, and was bound to ex-
 ercise ordinary care, having in view such knowledge and all
 the facts and circumstances.

The stop made eighteen rods from the track, at a place

Schaefer v. The Chicago, Milwaukee & St. Paul R'y Co.

where the approaching train could not be seen, and failing to hear it, when the wind was blowing in the direction of the train, is not, under the circumstances, ordinary care. For, when he started toward the crossing, he permitted his team to trot "pretty fast" all the intervening distance, and not only did not stop and look and listen, until too late, but made no effort to do so, but carelessly and negligently, and with no regard for his own life, permitted the team to get quite near, (if their fore feet were not on the track,) before he looked for or saw the engine.

If the plaintiff's son had stopped four or five rods from the track and looked for the train, this accident would not have occurred; or, if he had not stopped, but looked for the train at the place where it could have been seen, the accident would not have occurred.

Where a person traveling on a highway and approaching a known crossing of a railway track, with knowledge that the view of an approaching train is to an extent obstructed, heedlessly permits a team he is driving to pass over such highway "pretty fast," or allow the horses to trot, and makes no effort to look or listen for an approaching train for a distance of eighteen rods from the track, he is guilty of such contributory negligence as will prevent him from recovering, if a collision occurs, provided there are no circumstances which are calculated to distract his attention. Under the circumstances above stated, and the uncontroverted evidence in this case, we think ordinary care required that the deceased should have stopped and looked or listened at some place between the place where the team was stopped and the track. There was nothing to prevent his doing so, and there was nothing to distract his attention.

The views above stated are in accord, we think, with the great weight of authority in other states, and with the following cases decided by this court. *Artz v. C., R. I. & P. R. R.*, 34 Iowa, 153; *Haines v. Illinois Central Railway Co.*, 41 Id., 227; *Benton v. C. R. R. of Iowa*, 42 Id., 192;

Schaefer v. The Chicago, Milwaukee & St. Paul R'y Co.

Starry v. D. & S. W. R. R. Co., 51 Id., 419; *Funston v. C., R. I. & P. R. R. Co.*, 61 Id., 452.

It will be conceded that a traveler on a highway, when approaching a railway crossing, is not under all circumstances required to stop and look and listen for an approaching train, but, if due and ordinary care does not require him to do so under the facts in this case, the rule should be at once abrogated. Under the evidence, the plaintiff is not entitled to recover, and the jury should have been so instructed.

If we understand counsel for the plaintiff, they insist that, as the track could not be seen, although the engine and train could, plaintiff's son was excused from stopping and looking. But we do not think this is so. It was the engine and train which collided with the wagon and team, and it is immaterial whether the track could be seen or not, as the plaintiff's son had knowledge of its existence and location, and also knew that trains were likely to pass along it. The train was running at a speed of about eighteen miles an hour, and it was absolutely impossible to check it after the engineer saw, or could with the utmost diligence have seen, the team on the highway, before the collision took place.

When the engineer saw the team, the whistle was sounded twice. This, as we suppose, was the call for brakes, but counsel for the plaintiff insist that if it had not been done the collision would not have occurred. Possibly this is so, but the question is, was the engineer negligent in thus sounding the whistle. We think not. In the first place, the engineer saw the horses close to the track, and that a collision would certainly occur, unless something was done immediately to prevent it. To sound the whistle under the circumstances in the pending emergency was, we think, prudent and proper. There was no time for reflection. It was the usual thing to do, and, if the engineer had failed to do so, we think he possibly would have been negligent, if a collision had occurred, because of such failure. But, be this as it may, we are not prepared to hold that a

3. — :
sounding
whistle at
crossing :
negligence.

Dowell, Adm'r, v. The Burlington, Cedar Rapids & Northern R'y Co.

person is negligent who does an act in an emergency like that presented to the engineer, when there is not a moment's time for thought or reflection.

It is said, the errors assigned are not sufficiently specific. We are of the opinion that they are in the usual and ordinary form, and sufficient in this respect. Counsel say: "What is required to be specifically pointed out is not the particular instruction objected to, but the particular error ruled upon, as whether the instruction complained of is obscure, misleading, wrong as an abstract proposition, or not applicable to the facts, etc." We do not think such has been the practice, or that the statute so requires. In this case the errors assigned indicate clearly the instructions asked and refused, and that the court erred in refusing them. This, we think, is sufficient.

4. PRACTICE
in supreme
court: assign-
ment of er-
rors: degree
of precision
required.

REVERSED.

DOWELL, ADM'R, v. THE BURLINGTON, CEDAR RAPIDS &
NORTHERN RAILWAY COMPANY.

82	629
103	670
99	629
104	712

- 1. Railroads: RISKS ASSUMED BY EMPLOYEES: DANGERS FROM SNOW BANKS.**
Railroad employes assume the risk of all dangers necessarily attendant upon the operation of the roads. Among these dangers are those arising from snow and its removal from the track in the usual manner—by the use of snow plows; and an employe who is injured by a snow bank, made along the track by the ordinary use of a snow plow, cannot recover for such injury, and the company cannot be charged with negligence on account thereof.
- 2. Estates of Decedents: PAYMENT TO WIDOW OF DECEDENT NO SATISFACTION.** A railway company cannot satisfy the estate of an employe, killed through its negligence, by settlement with and payment to his widow—she not being the administratrix of his estate.

Appeal from Linn Circuit Court.

SATURDAY, DECEMBER 15.

ACTION to recover damages to the estate of which plaintiff is

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the administrator, resulting from the death of the intestate, caused by personal injuries received by him through the alleged negligence of defendant, while he was in its employment as a brakeman. There was a judgment upon a verdict for plaintiff. Defendant appeals.

J. & S. K. Tracy, for appellant.

Traer & Voris, for appellee.

BECK, J.—I. The plaintiff's intestate, while in the discharge of his duty as a brakeman upon a train running upon defendant's road, fell from the engine, where he, with the conductor, was at the time, and was run over and killed by the train. He was directed by the conductor to look back to discover whether the train was separated, and, in obedience to this command, went to the side of the engine. He was last seen in life there. No one observed his fall, and the cause of it is not shown by the evidence. At the time, the train was passing through a snow bank about ten feet high. The track had been cleaned off, and the snow deposited by the snow plow on the bank, four or five days before the accident. The snow bank at the bottom was far enough away to permit the cars to pass, and it receded at an angle of about forty five degrees, according to the testimony of some of the witnesses. Others testified that the bank at some points approached to within fifteen inches of the cars. The intestate assisted to clear off the track, and had knowledge of the character of the snow bank and the distance it was from the cars.

II. Plaintiff insists that the intestate, in looking back as directed by the conductor, was struck by the snow bank, which caused his fall, and that defendant was negligent in permitting the bank to remain too near the track. But there is no positive evidence supporting the fact upon which this theory is based, and the jury so find in response to a question propounded to them. The appearance of the snow at the place where the intestate fell did not indicate that he was

Dowell, Adm'r, v. The Burlington, Cedar Rapids & Northern R y Co.

struck by the bank. It did show that he fell against the bank.

III. The court directed the jury, in effect, that, if from the evidence they could not find whether the accident was the result of defendant's negligence, or want of ordinary care by the intestate, and "the matter is thus left to conjecture," their verdict should be for defendant, and that, if they found that the snow bank was so near the cars that the intestate could not have obeyed the order to look back without being struck, while exercising ordinary care, and in ignorance of the fact that there was a snow bank at the place, they should find for plaintiff.

1. RAILROADS:
risks assumed
by employ-
ees: dangers
from snow-
banks.

The defendant's counsel asked instructions to the effect that the defendant was not to be regarded as negligent on account of the proximity of the snow bank to the track, and that the deceased assumed, in entering the employment, the risk of the dangers resulting therefrom. These instructions were refused. We are of the opinion that defendant ought not to be charged with negligence on account of the proximity of the snow bank to the track. The accumulation of snow upon the railroad track must be removed, in order to make the operation of the trains possible. This was done in this instance by a snow plow, a common instrument used for the purpose of removing snow from the track. The defendant was not negligent in using it. These conditions and incidents connected with snow are known to the employes of railroads, and were well known to the intestate, for he assisted in clearing the track. The bank where the accident occurred was in the condition in which it was left by the snow plow. The dangers from the snow bank were such as are inseparable from the operation of the road when snow prevails and is removed from the track, and the risk of them was assumed by the intestate. Railroad employes assume the risk of all dangers necessarily attendant upon the operation of the roads. The dangers from snow, and from its removal from the track

Dowell, Adm'r, v. The Burlington, Cedar Rapids & Northern R'y Co.

in the usual manner, always attend the operation of railroads when snows prevail, and are contemplated by railroad employes when they accept employment in the operation of trains in winter, and the railroad companies are not liable for accidents resulting therefrom. These doctrines should have been expressed in an instruction to the jury.

IV. We are of the opinion that the verdict is without the support of evidence. There is no evidence tending to prove that defendant was negligent. In leaving the snow bank stand so near the track, it is not chargeable with negligence, and it is not attempted to establish negligence upon any other ground. And there is no evidence that the intestate, was struck by the snow bank, causing him to fall. The only evidence upon this point of the case tended to prove that he was not struck by the bank.

V. Defendant pleaded satisfaction of the damages claimed in this case by payment to the widow of intestate. She is not

2. **ESTATES of**
decedents :
payment to
widow of de-
cedent no
satisfaction.

and was not the administratrix, and could not release the claim of the estate of the intestate based upon his death through negligence of defendant.

She could release the claim for the damages she individually sustained, and the satisfaction pleaded by defendant could extend no farther. For the errors pointed out, the judgment of the district court is

REVERSED.

PHILP ET AL. V. THE COVENANT MUTUAL BENEFIT ASSOCIATION OF ILLINOIS.

1. **Original Notice: SERVICE UPON AGENT OF CORPORATION: NO JURISDICTION.** Upon consideration of the evidence in this case, it appears that the person upon whom notice was served, for the purpose of obtaining jurisdiction of the defendant corporation, was not employed in any office or agency for the defendant in this state, (Code, § 2613,) was not appointed agent of the defendant under section 1165 of the Code, and was not employed in the general management of defendant's business, as contemplated by section 2612 of the Code; and it is therefore *held* that the court obtained no jurisdiction by such service to render judgment upon default against the defendant.

62	633
86	611
62	633
d107	393

Appeal from Lee District Court.

SATURDAY, DECEMBER 15.

THE plaintiffs, as the heirs of John Philp, Jr., deceased, on the 12th day of December, 1883, commenced this action to recover of the defendant \$2,500, upon a policy of insurance upon the life of the said John Philp. The return upon the original notice is as follows: "This notice came to my hand for service on the 12th day of December, 1882, and on the 13th day of December, 1882, I served the same personally on the within defendant, Covenant Mutual Benefit Association of Illinois, by reading and delivering a true copy thereof to C. E. Hambleton, assistant manager of agencies of said association, and a general agent of defendant. Said service being made in the City of Keokuk, Lee county, Iowa." On the 8th day of February, 1883, the following entry was made on the judge's docket: "Default and judgment for \$2,626 and costs; 6 per cent." At the same time the court orally ordered default and judgment against defendant for \$2,626, but no entry was made on the court record, the same being withheld from record at the request of the defendant, after it was discovered that default and judgment had been ordered. On the 21st day of February, at the same term, the defendant

Philp et al. v. The Covenant Mutual Benefit Association of Illinois.

appeared and moved the court to set aside the default, accompanying the motion with an affidavit that the death of John Philp, Jr., was the result of suicide, whereby the policy, by its own terms, became void. The court overruled the motion, and ordered judgment to be entered of record of date February 8, 1883. The defendant appeals.

McKenzie & Calkins and Hagerman, McCrary & Hagerman, for appellant.

Craig, Collier & Craig, for appellee.

DAY, CH. J.—One of the grounds of the motion to set aside the default is that the defendant had not been served as required by law, and the court had no power or authority to entertain jurisdiction and to render judgment. Section 1165 of the Code, with reference to life insurance companies, provides: "Such company shall also appoint an attorney or agent in each county in this state, in which the company has an agency, on whom process of law can be served, and such company shall file with the auditor of state a certified copy of the charter or articles of incorporation of said company, and also a certified copy of the certificate of appointment of such agent or agents, which appointment shall continue till another attorney or agent be substituted."

Section 2612 of the Code provides: "When the action is against a municipal corporation, service may be made on the mayor or clerk, and if against any other corporation, on any trustee or officer thereof, or on any agent employed in the general management of its business, or on any of the last known or acting officers of said corporation."

Section 2613 of the Code provides: "When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

In support of the motion, the defendant filed the affidavit of E. F. Phelps, secretary and general manager of the defendant, stating that the defendant is a corporation organized under the laws of the state of Illinois, with its general office at Galesburg, Illinois, and that C. E. Hambleton, upon whom, as agent of the defendant, the notice of this suit was served, was not at, nor for a long time prior to, the time of service, a trustee or officer, nor an agent employed in the general management of the defendant's business, nor did defendant at such time have an office or agency in Lee county, Iowa, nor was said Hambleton ever appointed agent in this state, under section 1165 of the Code. The further evidence submitted upon the motion showed that, at the time service was made upon Hambleton, he was in Keokuk, acting as attorney for the defendant in an action before a justice of the peace; that his home was in Galesburg, Illinois, and he had no headquarters in Iowa; that he was assistant manager of agencies, and acted for the company whenever sent out by them to investigate losses, to look up testimony in law suits in which the company was engaged, and at times to look after local agents, investigate the facts, and report to the general manager, but that he did not take risks or issue policies, and that the person performing such duties as Hambleton performed did not act in states where there were agents, and that Funk, of Des Moines, was the agent for defendant in Iowa. Some evidence was introduced of declarations made by Hambleton, but this evidence we regard as incompetent.

Hambleton's agency cannot be proved by his own declarations. So far as is shown by competent evidence, Hambleton was not authorized to do any act for the defendant in Iowa, except to appear as attorney, in behalf of the defendant, in the justice's suit before referred to. As Hambleton was not employed in any office or agency for the defendant in this state, and was not appointed agent of the defendant under section 1165 of the Code, it follows that service upon him can be sustained only under section 2612 of the Code,

Philp et al. v. The Covenant Mutual Benefit Association of Illinois.

upon the ground that he was employed in the general management of the business of the defendant. An agent who had no authority to act for the defendant in this state, and whose duties outside of the state were limited to the investigating of facts, and the reporting of them to the general manager, cannot, it seems to us, be an agent employed in the general management of the defendant's business, as contemplated in section 2612 of the Code.

The appellee relies upon *The Farmers' Insurance Co. v. Highsmith*, 44 Iowa, 330; and the *Centennial Mutual Life Association v. Walker*, 50 Id., 78. In the former of the above cases, service was made upon an agent of the defendant transacting business for it in the county where suit was brought, and who made the contract of insurance which was involved in the action in which the service was obtained. The decision is based upon the provisions of section 4, chapter 95, of the laws of 1872. In the latter of the above cases, service was made upon the general manager of agencies for the state of Iowa. Neither of the cases supports the service made in this case. In our opinion the service upon Hambleton did not confer jurisdiction, and the court should have set aside the default and allowed the defendant to make defense.

REVERSED.

THE COUNTY OF DES MOINES V. HINKLEY & NORRIS ET AL.

D. SIGLER V. THE COUNTY OF DES MOINES.

1. **Evidence: BANK CHECKS: PAROL TO EXPLAIN WORDS OF LIMITATION.**

Where checks were drawn "to be paid as soon as we settle with the county," it was competent, for the interpretation of these words, to show by parol that it was understood by the drawers, drawee and payees that the checks were to be paid out of a particular fund due the drawers from the county, and which the drawers had previously assigned to the drawee of the checks as security for advances.

2. **Equitable Assignment: OF PARTICULAR FUND: FACTS CONSTITUTING.**

No particular form of words is necessary to create an equitable assignment of a fund. Anything which evinces an intent to do so is sufficient. And where parties, by an order absolute in its terms, assigned to a bank, as security for advances, the money due and to become due them from the county upon a contract, and afterwards drew checks upon the bank to various parties "to be paid as soon as we settle with the county," which checks the bank accepted, to be paid in the order of presentation, out of and to the extent of the fund, *held* that these facts constituted an equitable assignment, irrevocable—to the bank, of so much of the fund as was necessary to reimburse it for advances made, and to the payees of the checks, in their order, of so much of the fund as was necessary to pay them, so long as the fund should hold out.

3. **—: OF PART OF A PARTICULAR FUND: HOW AFFECTED BY WILL OF CUSTODIAN.** While the custodian of a particular fund may not be bound to accept an order drawn on him for a part of the fund, yet such an order will be upheld as constituting an assignment in equity, especially where, as in this case, the custodian consents thereto.4. **Garnishment: COUNTY EXEMPT FROM: WAIVER OF EXEMPTION.** A county is exempt from garnishment process; (Code, § 2976;) and it is doubtful whether it waives such exemption by bringing an action in relation to the garnished fund, and making the garnishors parties thereto.5. **—: OF FUND IN CUSTODY BUT NOT IN POSSESSION.** One who has the equitable right to the custody of a fund, but not the actual possession thereof, may be garnished in relation thereto for the debt of those who are the equitable owners of the fund; and such garnishment will create a lien upon the fund, senior to that created by checks subsequently drawn thereon by the equitable owners.6. **Contract: FOR ERECTION OF COURT HOUSE: DISTRIBUTION OF FINAL PAYMENT AMONG CLAIMANTS.** Where the contractors for the erection of a court house made to one K. an order upon the county for a certain amount, to be paid "out of any money that may be due us on final set-

68	637
78	431
62	637
79	431
62	637
114	580
62	637
121	388
62	637
4124	757
62	637
127	367

The County of Des Moines v. Hinkley & Norris et al.

tlement," but it appeared from the evidence that it was the intention that K. should be paid only out of the *profits* of the job, *held* that his order was entitled to payment only after satisfaction of material men, who held subsequent orders drawn by the contractors on the same fund, notwithstanding, because the building was a public one, they could not establish mechanics' liens thereon. And *held*, further, under the circumstances of this case, that K's order was payable only out of the profits of the work as contemplated when the order was given, and that he was not entitled to be paid thereon an amount due the contractors for extra work on the same building, subsequently contracted for; and the county, having paid the price of such extra work to the contractors, was not bound to pay it again upon K's order.

Appeal from Des Moines Circuit Court.

SATURDAY, DECEMBER 15.

IN April, 1879, Hinkley and Norris contracted with Des Moines county to erect a court house for the sum of \$86,200.00. In October, 1879, they gave to the National State Bank an order on the county for all money due them on the contract. The county had knowledge of this order, and the same was filed in the office of the county auditor. Under it the bank drew all the money due under the contract, except the final estimate.

The court house was nearly completed in December, 1881, and early in that month it was ascertained that Hinkley & Norris were indebted to divers persons for material used in the construction of the court house, which they could not pay out of the money due on the contract, and their creditors made efforts to obtain liens on such fund. Checks were drawn by Hinkley & Norris, in favor of certain creditors, on the bank. Other creditors commenced legal proceedings, and garnished the county, and still others procured orders from Hinkley & Norris on the county, and afterward obtained from them an assignment of the amount due therefrom. D. S. Sigler, as assignee of one King, claimed a part of said fund.

The county commenced this action, and admitted that it was indebted to Hinkley & Norris, and stated its readiness to pay the amount due. The several creditors of Hinkley & Norris

claiming any part of the fund were made parties, and they severally filed pleadings in which their respective rights were set forth.

Sigler commenced an action at law against the county, and he was afterward made a party by the county to the action in equity, and he appeared therein and claimed that he was entitled to a part of said fund.

The bank was made a party, and it claimed a lien on the said fund. The several actions were tried together. The further material facts appear in the opinion. The court decreed that Sigler was not entitled to any part of the fund, and he appeals.

It was further decreed that the holders of certain checks on the bank were entitled to priority, and other claimants of the fund appealed from this portion of the decree.

Newman & Blake, for Sigler.

Poor & Baldwin, for appealing creditors.

P. Henry Smythe & Son, for Burnett & Co.

Hall & Huston, for appellees.

SEEVERS, J.—I. During the progress of the trial, and on the eighteenth day of January, 1882, an interlocutory decree was entered, in which it is stated that the court “finds that there is due from the county of Des Moines upon the contract with Hinkley & Norris \$7,545.00, and no more,” and it was ordered that the county pay said sum to the clerk; and, when this was done, that the said “county of Des Moines be dismissed out of court with its costs.”

The money above found due was paid to the clerk, and, as there was no exception taken by any of the parties to the interlocutory decree, the county should not be regarded as a party to this appeal, except as to a special fund, and as to it, the controversy is alone between the county and Sigler.

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It is further provided by the interlocutory decree that, "all parties hereto consenting," it is ordered "that the clerk at once pay out of said fund to the National State Bank \$1,919.35, the amount of its claim."

As the bank is satisfied with the foregoing relief, it is not, therefore, a party to this appeal.

II. The rights of the respective creditors of Hinkley & Norris, other than Sigler, will be first considered. The order given by Hinkley & Norris to the bank is in these words:

"Burlington, Io., Oct. 22, 1880.

"To the Honorable Chairman of the Board of Supervisors of Des Moines county, Iowa:

"Please pay to the National State Bank of Burlington any and all sums of money which may be due us under our contract with Des Moines county, Iowa, to build court house, issuing orders therefor payable to them for such sums of money, and the receipt of bank shall be of same force and effect as if the same were signed by us.

"HINKLEY & NORRIS."

The primary object of this order was to secure the bank for any money it should from time to time advance to Hinkley & Norris. Under it, however, the bank drew all the money due on the contract, without reference to the fact whether Hinkley & Norris were indebted to it or not, and the money so drawn was placed to the credit of Hinkley & Norris, who from time to time drew their checks on such fund.

On the third day of December, 1881, by an indorsement on the order, the bank stipulated with the county that the amount then due it was \$3,500, and that such amount should not be increased.

About this time it became apparent that Hinkley & Norris could not pay their various creditors who had furnished material used in constructing the court house. The bank owed them nothing, and the amount due from the county had not been agreed upon and adjusted. But, upon the supposition

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that such adjustment would soon be made, and the amount due paid into the bank, Hinkley & Norris arranged with the bank to give checks on it to pay off sub-contractors "around Burlington"—the checks to be made payable when there was a settlement with the county. Checks in the following form were accordingly drawn:

"Burlington, Io., January, 1881.

"National State Bank of Burlington: Pay to Murry Iron Works one hundred sixty-five and $\frac{81}{100}$ dollars.

\$165 $\frac{81}{100}$

HINKLEY & NORRIS."

Across the face of the check there was written the following words: "To be paid as soon as we settle with the county." All the checks were like the foregoing, except the date, payee and amount. They were all left with the bank for collection.

The understanding between the bank and the several holders was that the checks were to be paid if the bank received any money that could be applied to that purpose; and the bank, at the request of the several holders, wrote across said checks the following words: "Accepted, payable whenever we have funds properly applicable to this check, but subject to all prior acceptances."

The bank demanded the amount due under the contract of the county, which it refused to pay, solely on the ground, as we understand, that it was feared the county could not safely do so because of the King or Sigler claim.

We find from the evidence that the understanding between Hinkley & Norris, the bank, and the payees of the several checks, was that the checks were drawn on and payable out of the funds due from the county on the court house contract.

It was the expectation and belief of these parties just named, at the time the checks were drawn and left in the bank for collection, that the money due from the county would be paid into the bank, and that, after the payment of the amount due the bank, the residue of the money could and would be applied to the payment of the checks.

The first question to be determined is whether, under the circumstances above stated, an equitable assignment of the fund in question, or so much thereof as was necessary to satisfy their claims, passed to the check holders. It is insisted that no such assignment was created, because, "when an order general in its terms is accepted by the payee and attempted to be enforced, parol evidence is not admissible to prove that it is payable out of a particular fund."

1. EVIDENCE:
bank checks:
parol to
explain words
of limitation.

Several authorities are cited in support of this proposition, the purport of which is that a written contract cannot be controlled, contradicted, or added to, by parol. No one disputes that such is the general rule. But the proposition above stated is faulty, in that it is thereby assumed that the checks are drawn on a general fund. The checks, however, were not payable until a "settlement is made with the county." They, therefore, were not negotiable, and the meaning of the foregoing words must be ascertained. They constituted a part of the contract, and a construction must be placed thereon. We must look at the surrounding circumstances, the acts, conduct, and what was said by the the parties, in order to ascertain what meaning they attached to the words above mentioned. Clearly, the contract should be construed as the parties understood it. There is no doubt, we think, that Hinkley & Norris, the payees, and the bank, understood that the checks were to be paid out of the court house fund, and that the checks were drawn thereon. The checks were not made payable absolutely out of that fund, for the reason that the bank was not in possession of the money.

The only possible meaning that can be attached to the words—payable "when settlement is made with the county," when due weight is given the acts and conduct of the parties, is that the checks were to be paid out of the court house fund. This was the only fund there was. There was no expectation that the bank would receive or have any other money which could be applied to the payment of the checks. Besides this,

it was held in *Moore v. Lowrey*, 25 Iowa, 336, in reference to the same question under consideration, that it was not "necessary that the intent and the contract of the parties fully appear in the writing, but they may be otherwise shown."

From this we understand that, in order to arrive at the intent of the parties and the meaning of the contract, parol proof may be resorted to. This we understand to be the universal rule—that, in the interpretation of contracts parol or verbal testimony may be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. *Greenleaf on Ev.*, § 286.

We therefore conclude that the checks were drawn on a particular fund.

III. But it is said that "an order requesting the drawee to pay out of funds which the drawee is authorized to collect for the drawer, is not an assignment of, nor does it create any lien upon, such funds." Authorities ^{2. EQUITABLE assignment of particular fund: facts constituting.} are cited in favor of this proposition. But we do not think the proposition thus broadly stated is applicable to the facts in the case at bar. The question, of course, is, whether the bank was a mere collecting agent, or whether, as between the county and Hinkley & Norris, it did not have the absolute control of the funds. It is true, the bank did not have the funds in its actual possession, but this was only because the county refused to pay it over because of the King or Sigler complication.

We do not think any of these parties, other than those last named, can avail themselves of this circumstance.

The order given the bank on the county was absolute in terms, and under it all the parties had acted. If the county had paid the money, when demanded, to the bank, all liability on its part would have been at an end, as against all the parties to this action, except King or Sigler. The appealing creditors would have no right to complain. Under the order, the bank had the absolute right to receive and collect this fund. It had a beneficial interest in so doing to the extent,

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at least, of its advances. We presume it will not be claimed that the order did not have the effect to create an equitable assignment of the fund to the extent of the advances made by the bank. The bank, under the order, controlled the whole fund, and had the right to receive it all as security for the advances made. But it may be said, and it is undoubtedly true, that, as between Hinkley & Norris and the bank, the former had the power to control the disposition of so much of the fund as was not required to pay the advances. This they undertook to do, and, with the consent of the bank, did, when the checks were drawn on the fund. By the bank, Hinkley & Norris and the check holders, the fund should be regarded as being in the possession and control of the bank. Equity should regard that as done which the parties intended to accomplish by what they did.

But, as we have said, the order in favor of the bank undoubtedly was sufficient to create an equitable assignment of the whole fund as security for advances, and, to the extent of the latter, it was clearly irrevocable, because the county and all parties had notice of and acted under it. This is so, although the bank was not in possession of the fund, and, in one sense, was a mere collecting agent for Hinkley & Norris. The checks were orders on the bank to pay the payees a portion of the fund, the whole of which as against all the world, except Hinkley & Norris, it had the right and power to control. The bank, after the checks were given, was something more than a mere collecting agent for Hinkley & Norris, the drawers of the checks. In a sense it was not the agent of the drawers of the checks, but the agent of the payees to collect such fund for them. The checks amounted to an irrevocable assignment of so much of the fund as was required to pay them. That is to say, the assignment was irrevocable, unless the bank and the check-holders consented that it should be otherwise.

It is said, Hinkley & Norris had the right to pay the check-holders with other money, and that they would then have the

power to dispose of this fund, and, because of this power, it is said, no equitable assignment was created, for the reason that the assignee must have the power of absolute and unconditional control.

But suppose one of the check-holders should refuse to receive payment of his debt when tendered by Hinkley & Norris, could he be compelled to do so? We incline to think not. He certainly could transfer his interest in the fund to another, who would thereby become vested with his rights.

He could do this without the consent of Hinkley & Norris, and, as we think, against their protest. There can be no other or greater power of control than this. An absolute owner can do no more.

No particular form of words is required to create an equitable assignment of a fund. Any thing which evinces an intent to do so is sufficient. *Moore v. Lowrey*, before cited, and *McWilliams v. Webb*, 32 Iowa, 577; *First National Bank of Canton v. D. & S. W. R. R. Co.*, 52 Id., 378.

It is further urged that the checks were not accepted by the county or the bank. But we think notice was all that was required, and that it is immaterial whether the county had notice or not, because, as between these parties, the bank was the equitable custodian of the fund, and, as such, did accept and bind itself to pay the checks in the order of presentation out of and to the extent of the fund.

It is, perhaps, incidentally claimed, but not, we think, strenuously insisted by counsel, that there cannot be an equitable

3. — : of assignment of a part of a fund under any and all
part of a fund : how circumstances. It may be that the custodian of
fund : how affected by the fund would not be bound to accept an order
will of custo-
dian.

drawn on him for a part of such fund. But we think such an assignment should and would be upheld in equity. Upon principle, it seems to us this must be so, and we think the weight of authority is in favor of such proposition. We do not deem it necessary to cite or comment on

the authorities, but see *Exchange Bank v. McLoon*, 73 Me., 498, and the authorities there cited.

In the case at bar, the bank not only had notice of the partial appropriation or assignment, but consented thereto, and promised to pay. Clearly, we think, this was sufficient.

IV. Burnett & Co., on January 13, 1883, caused attachments to issue against Hinkley & Norris, and garnished the county and bank. Afterward, Hinkley & Norris assigned the fund in question to the appealing creditors, represented by Poor & Baldwin. As to a portion of the claim of Burnett & Co., the court held that they were check-holders, and that, as to another portion, they obtained no lien on the fund by reason of the attachment and garnishment proceeding. From this last ruling Burnett & Co. appeal.

If in this respect the court erred, then Burnett & Co. have priority over the appealing creditors.

To the cross-petition of Burnett & Co., setting up a lien or claim under the attachment and garnishment, the county answered, claiming that under the statute it was exempt from garnishment. Code, § 2976; *Jinks v. Osceola Tp.*, 45 Iowa, 554. It is, however, insisted that the county waived such exemption by bringing this action and making Burnett & Co. parties, and calling on them to assert any claim they had. This we regard as doubtful.

The question, however, remains as to whether Burnett & Co. obtained any lien on the fund in controversy under the garnishment against the bank. One thing is certain—either the county or the bank had the custody and control of the fund. We have heretofore said that in our opinion the bank was the equitable custodian thereof, although it was not in its actual possession. It therefore follows that any right or lien which attached to such fund should be protected in a court of equity.

When the bank was garnished, the order given the bank to receive the money from the county had not been revoked by

4. GARNISHMENT: county exempt from: waiver of exemption.

5. —: of fund in custody but not in possession.

Hinkley & Norris. The bank, therefore, had the right to the actual custody of the fund, and we think Burnett & Co. obtained a lien on the fund in equity by the garnishee proceeding against the bank. The court, we think, erred in holding that any portion of the claim of Burnett & Co. was junior to that of the appealing creditors.

V. All the other defendants combine in resisting the claim of Sigler, or, at least, they claim that their right to the fund is prior and superior to his. In order to determine this question, some additional facts must be stated. Hinkley & Norris and King were bidders for the court house, and, as we understand, neither of their first bids was accepted. We believe, however, that King's was the lowest. Hinkley & Norris obtained leave to put in an additional bid. Before doing so, they consulted with King, and it is pleaded that a corrupt bargain was made between them, by which King was not to bid, and that Hinkley & Norris were to divide the profits with or pay him a sum of money in consideration that he did not bid again. We do not think it has been established that such a bargain was entered into.

After the contract was awarded to Hinkley & Norris, the county insisted that it must have an "Iowa bond" from them, conditioned that they would in all respects perform the contract. Hinkley & Norris applied to King to get them such a bond, and they agreed to otherwise secure him, and, for his services in this respect, and the risk taken, King claims that Hinkley & Norris agreed to give him \$3,000. King furnished a bond which was satisfactory to the county, and the following agreement was entered into between Hinkley & Norris and King:

"This agreement, made this 25th day of April, 1879, by and between O. J. King, of Corning, Iowa, and Hinkley & Norris, of Indianapolis, Ind., witnesseth: That the parties hereto, having by their mutual efforts secured the contract for the building of the Des Moines county court house, do hereby

G. CONTRACT
for erecting
court house:
distribution
of final pay-
ment among
claimants.

agree that the said O. J. King is to procure, by himself or friends, a good and sufficient bond, to be approved by the supervisors of said county, and is in turn to receive from said Hinkley & Norris an indemnifying bond to be satisfactory to him. That said Hinkley & Norris are to take upon themselves the carrying out of said contract, and to give to said King three orders, of even date herewith, for one thousand dollars each, payable as named in said orders, and all of the balance of any profits to be derived from such contract are to belong to Hinkley & Norris."

In pursuance of this agreement, or a prior understanding, Hinkley & Norris drew three orders on the county for \$1,000 each, payable to King. The orders were subsequently taken up, and are not before us. But it sufficiently appears that they were to be paid as the work progressed:—that is, it was expressed on the face of the orders that they were to be paid before the completion of the court house.

Hinkley testifies that King was to be paid out of the profits, and that the orders were given under the belief that \$3,000 would be one-third of the profits. This King denies; but he admits that there was some talk about profits. Shortly afterwards, another contract was made between King and Hinkley & Norris, whereby it was agreed that, in case of the death or disability of Hinkley, "so that he was unable to carry on said work," King had the right to complete the same, and to collect of the county for that purpose a sufficient amount of the money agreed to be paid, and the residue, if anything, was to be paid to Hinkley & Norris, or their representatives.

Afterward, and in November, 1880, King surrendered the three orders for \$1,000 each, in consideration of the payment to him by Hinkley & Norris of \$50, and the following order given by them on the county:

"To the County of Des Moines: Please pay to the order of J. O. King, upon the completion of the new court house now

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being built by us for Des Moines county, the sum of \$2,750, out of any money that may be due us on final settlement.

“HINKLEY & NORRIS.”

This order was accepted by the board of supervisors, and is the same order under which Sigler claims. It is not claimed that Sigler's rights are any better than King's. Upon this order Sigler brought the action at law against the county, and set up his rights in the equitable action. He claims that he should be paid in full out of the fund in controversy before the other defendants, who, however, insist that this cannot be, because King was to be paid out of the profits, and that, before there could be any profits, all persons who furnished material for the court house must be first paid.

But for the fact that the three orders were to be paid as the work progressed, and, therefore, before it could be certainly known that there would be any profits, the preponderance of the evidence, we think, as to this matter, is with the defendant material-men.

The written contract, above set out in full, clearly, we think, so indicates, and therefore confirms the evidence of Hinkley. Nor do we think the fact that the orders were made payable prior to the completion of the building is a controlling circumstance; because, as we suppose, the parties estimated that the foundation, for instance, would cost a certain amount, and that there would be so much profit in building it; and again, so much when the building was erected, and another portion when the house was completed.

There is evidence tending to show that the orders were made payable at periods corresponding to the foregoing theory. But there is evidence tending to show that one of the orders was payable in six months, and without reference to how much of the building was then done.

It is difficult to believe that Hinkley & Norris would agree to pay King \$3,000, if there were no profits. If the orders were to be paid absolutely and at stated periods, without reference to profits, it is difficult to understand why King sur-

rendered the orders, and took another for a less amount, at a time when, as Hinkley testified, it had become apparent that there would be no profits. The last order was to be paid out of any money due Hinkley & Norris on final settlement. If nothing was due from the county, it is clear there could be nothing paid. But, it is said, there was due on such settlement more than sufficient to pay the order. Conceding this to be so, it is replied that the parties clearly contemplated that the court house was to be completed in accordance with the contract before anything could be paid, and that, to do this, material must be purchased, either for cash or on credit, and that it cannot and should not be presumed that the parties intended, if material was purchased on credit, that King should be paid before the material-men; that, in view of all the circumstances, the parties contemplated that the house should be completed and paid for by the contractor, and that, if there was more money than sufficient to do this, then King should be paid before Hinkley & Norris were entitled to anything.

We are forced to the conclusion that this is the only proper construction that can be given to the order, in view of all the circumstances.

The money is due Hinkley & Norris from the county only because of the fact that a material-man cannot establish a mechanics' lien against a public building. But, as to King, it is inequitable that he should be paid before such persons, and we are satisfied that it was never contemplated that he should be.

VI. After the last order had been given to King, certain extra work was contracted for and done by Hinkley & Norris.

THE SAME. In January, 1882, the amount due for such extra work was adjusted, and the sum of \$650 was agreed upon as due. This amount was paid Hinkley & Norris by the county, and Sigler claims that he is entitled to judgment against the county for the amount above stated, because it was money due on final settlement, and, therefore, due him under the terms of the order.

Wallace v. Wallace.

As no extra work had been done or contracted for when the order was given, the only final settlement contemplated by the parties was the final settlement of the then existing contract, and, when such settlement was made, the county was directed to pay the amount found due, to the extent of the order of King.

Hinkley & Norris never intended that King should receive any part of the money due for extra work, and the county never was directed to pay him any part or portion of said money. It cannot be presumed from the terms or words of the order that the county was directed to pay money to King on account of a contract which had no existence when the order was given. The order must be limited to the contract in force at the time it was given. None other was contemplated by the parties.

The decree of the circuit court is affirmed, except as to the costs.

MODIFIED AND AFFIRMED.

WALLACE V. WALLACE.

1. **Evidence: ADMISSION OF: ERROR WITHOUT PREJUDICE.** Error in admitting evidence to establish a fact fully established by other evidence can work no prejudice, and is no ground for reversal.
2. ———: ———: **THE BEST MUST BE PRODUCED.** The fact that plaintiff's husband had a written lease for certain land is best proved by the production of the lease itself, and the admission of oral testimony to prove that fact, without laying a foundation therefor, was error.
3. ———: **OF CONSIDERATION: MATERIALITY.** Where defendant claimed to be the owner of property which formerly belonged to plaintiff's husband, evidence of consideration passing from defendant to plaintiff's husband was material, and should have been admitted.
4. ———: **CROSS-EXAMINATION.** Where plaintiff testified that she owned certain land, it was proper, on cross-examination, for the purpose of testing the accuracy and truthfulness of her statements, to require her to state how she became such owner.

62	651
89	200
62	651
d142	149

 Wallace v. Wallace.

5. ———: POSSESSION AS EVIDENCE OF OWNERSHIP. One who has possession of personal property is *prima facie* the owner thereof, and he who seeks to establish ownership in another than the one in possession, has the burden of proof.

Appeal from Howard Circuit Court.

SATURDAY, DECEMBER 15.

ACTION OF REPLEVIN. There was a judgment upon a verdict for plaintiff. Defendant appeals. The facts involved in the questions ruled by the court are stated in the opinion.

McCarty & McCook, for appellant.

Reed & Marsh, for appellee.

BECK, J.—I. The plaintiff claims the property involved in this suit as the widow of Henry Wallace, on the ground that it was exempt from execution, and by the law was set apart as her property. Defendant claims that he is the lawful owner of the property.

1. EVIDENCE: admission of error without prejudice.

A copy from the records of a county in Wisconsin, showing plaintiff's marriage to Henry Wallace, was admitted in evidence, against defendant's objection that it was not sufficiently authenticated. The objection is renewed in this court. We waive the questions discussed under this point, for the reason that the marriage of the parties was sufficiently shown by reason of their cohabitation, the husband's recognition of the plaintiff as his wife, and his admissions of that relation. If the record was not sufficiently authenticated, its admission was without prejudice.

II. The property in question consists of farming utensils and stock used by farmers. It was kept upon a farm where Henry Wallace died, and which belonged to defendant. Plaintiff was permitted to prove by her oral testimony that her husband held a life lease of the farm, which was in writing. To this evidence defendant objected, on the ground that the lease itself was the best evidence, and parol proof of its contents was inadmissible. The objec-

tion was well taken, and should have been sustained. The evidence in regard to the lease was important in tending to establish plaintiff's title to the property. If he had no lease, it would be a circumstance in favor of defendant, as the property was used upon the farm, and, if defendant was cultivating it, a presumption would arise that he used his own utensils and stock; so, if plaintiff's husband was farming the land, there would arise a presumption that he owned the property used by him for that purpose. These presumptions, though slight, would doubtless have some effect with the jury. The court, therefore, erred in not requiring the introduction of the written lease.

III. The court rejected evidence offered by defendant tending to show that he had assumed debts owing by Henry Wallace. The evidence was competent in order to establish a consideration for the transfer of the property from the deceased to defendant, and should have been admitted. In one instance, defendant proposed to testify to declarations and directions made by the deceased in regard to the defendant's paying one Bigby. Both defendant and Bigby were present at the time. The objection to the evidence was on the ground alone of immateriality. It was surely material in order to show the true extent and character of the transactions between defendant and the deceased.

IV. The plaintiff testified that her husband cultivated some land belonging to her. She was interrogated on cross-examination as to how she acquired the land, and an objection to the evidence was sustained on the ground of immateriality. We think it should have been answered. Plaintiff alleged ownership of the land. The accuracy and truthfulness of her statements the defendant had a right to test by requiring her to explain how she became the owner. For this, if for no other reason, she should have been required to answer the question.

V. The defendant requested certain instructions to the ef-

3. — : of consideration : materiality of.

4. — : cross-examination.

Kershman, Adm'r, v. Swehla.

fect that possession of the property at the time of the death of Henry Wallace, if the jury so found, *prima facie* invested defendant with the title, and cast the burden upon plaintiff to show title in her husband when he died. Instructions reflecting these familiar rules of the law ought to have been given. Other questions discussed by counsel, as they may not arise again on the retrial of the case, need not be considered. For the errors pointed out the judgment in the circuit court is

REVERSED.

62 654
106 583

KERSHMAN, ADM'R, v. SWEHLA.

1. **Practice in Supreme Court: REVIEW OF EQUITY CASE UPON ERRORS.** Where upon the trial of an equity case the court errs in overruling a motion to suppress a deposition taken without authority of law, and, upon an appeal of the cause to this court, such ruling is assigned as error, this court cannot, on account of the condition of the evidence, try the cause *de novo* upon its merits, but will review it upon the error assigned, and remand it to the court below.
2. **Practice upon Procedendo: DUTY OF COURT.** Where an appeal is taken in an equity case, and it is reviewed upon errors, and remanded to the court below on account of error in admitting a deposition on the part of plaintiff taken without authority of law, the court below, upon *procedendo*, can neither dismiss the cause nor render a decree for defendant, but must try the case anew upon its merits, correcting the errors pointed out in the decision of this court.
3. **Practice in Supreme Court: RULINGS NOT APPEALED FROM NOT CONSIDERED.** Errors in rulings not appealed from cannot be considered in this court.

Appeal from Chickasaw Circuit Court.

SATURDAY, DECEMBER 15.

ACTION IN CHANCERY. The appeal in this case was taken by defendant from the order of the circuit court overruling

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his motion to enter a decree upon a *procedendo* issued by this court. The facts of the case upon which the decision is based appear in the opinion.

Brown and Portman, for appellant.

A. C. Boylan, for appellee.

BECK, J.—I. Upon a former appeal by defendant in this case, the judgment of the circuit court was reversed, and the cause was thereupon remanded to the court below. See 59 Iowa, 93. Upon the filing of a *procedendo* in the circuit court, the defendant moved that a decree be entered in his favor. The motion was overruled, and from this decision defendant appeals.

II. Upon the former appeal the decree, which was against defendant, was reversed, on the ground that the circuit court erred in overruling a motion to suppress certain depositions. This decision was to the effect that the depositions were taken without authority of law, and, for that reason, were not competent to be read in evidence. Of course, as the depositions were not admissible as evidence in the circuit court, they were not competent evidence in this court. The evidence embodied in them was not considered. The cause was not tried *de novo* on its merits, but was remanded for further proceedings in the court below. The reason that it was not tried here on its merits was that the evidence for the plaintiff was not in a form to be lawfully admitted. As the cause was not triable *de novo*, it was competent for the court to review it upon errors assigned. *Cross v. The B. & S. W. R'y Co.*, 51 Iowa, 683. Upon discovering that errors had been committed, by reason of which the cause could not be tried upon its merits, it was the duty of this court to remand the cause to the end that the decision of the court below should be corrected. It was neither proper to dismiss plaintiff's action, nor to render a decree for defendant. In case either had been done, justice would have been defeated by a decision

Peters v. Ham & Co.

without a trial in which the real merits of the controversy were brought before the court for decision. For the same reason, when the cause was remanded, the court below could neither dismiss it nor render a decree for defendant, but was required, to try it anew, correcting the errors pointed out in the decision of this court. *Jordan v. Winsor & Snyder*, 48 Iowa, 180; *Sweet, Ex'r., v. Brown et al.*, 61 Id., 669. The circuit court rightly overruled defendant's motion for a decree in his favor.

III. The plaintiff asked for time to file affidavits to show that no appeal had been taken in the case, etc. This application was refused, and the cause was continued and set down for trial upon deposition. As plaintiff did not appeal, and defendant does not complain of these rulings, we cannot review them. It may be remarked that, as the cause was continued, plaintiff had what he asked for—time to file affidavits. And the court, in setting the cause down for trial on depositions, acted under authority of the statute. Code, § 2742. The decision of the circuit court is

AFFIRMED.

PETERS V. HAM & CO.

1. **Mortgage: MISTAKE IN DESCRIPTION: RECORD NOTICE TO SUBSEQUENT MORTGAGEE.** Where the property intended to be mortgaged was in "Zollar's addition," but by mistake it was described as being in "Zulauf's addition"—there being additions of both names to the city in question—and the index in the recorder's office showed the mortgaged property as being in Zulauf's addition, but referred to the complete record for a fuller description, *held* that a subsequent mortgagee was bound only by what appeared upon the index, and that he was not charged with constructive notice that the property was in fact in "Zollar's addition," though he might have suspected as much, had he examined the complete record.

2. ———: ———: SUBSEQUENT MORTGAGEE WITH ACTUAL NOTICE: PRIORITY OF LIEN. Where one, intending to mortgage to plaintiff certain property, by mistake erroneously described the property, but the mortgage was recorded as made, and afterwards, upon discovering the mistake, he made another mortgage to plaintiff to secure the same indebtedness, correctly describing the property, and on the date of the last mortgage he also made a mortgage to defendants upon the same property, defendants having actual notice at the time of plaintiff's prior mortgage and the mistake therein, *held* that, as against defendants, the lien of plaintiff's corrected mortgage related back to the date of his first mortgage, and was superior to the lien of defendants' mortgage, notwithstanding defendant's mortgage was filed for record before plaintiff's corrected mortgage. *Day v. Griffith*, 15 Iowa, 104, and *Cobb v. Chase*, 54 Id., 253, distinguished.

Appeal from Wapello Circuit Court.

FRIDAY, JANUARY 25.

ACTION in equity to foreclose a mortgage.

In April, 1873, C. C. Peters executed a mortgage to the plaintiff on "Lot eight of Zulauf's sub-division to the city of Ottumwa, said lot being situated at the corner of Front and McLean streets in said city." In March, 1874, "to correct an error" in the foregoing, the mortgagor executed another mortgage to the plaintiff, which states that the description which reads, lot 8, "Zulauf's sub-division," should read "Zollar's addition to Ottumwa." On the same day, Peters executed a mortgage on the property described in the last or corrected mortgage to the defendants. This mortgage was first filed for record, but the plaintiff claims that the defendants had express notice of the mortgages executed to him. The relief asked was that defendants' mortgage be declared to be junior to the lien of the plaintiff. The court found for the defendants, and decreed that their mortgage constituted the first lien. The plaintiff appeals.

W. H. C. Jaques and *M. J. Williams*, for appellant.

Moore & Steck, and *S. W. Simmons*, for appellee.

SEEVERS, J.—I. At the time the mortgages were executed, there was an addition to Ottumwa known as Zulauf's sub-division of out lot 10, and there is a lot 8 in that addition. It is, however, claimed, and it will be conceded, that neither Front nor McLean street is in such sub-division; but that said streets are in Zollar's addition, and that lot 8 in said addition is situated on the corner of said streets.

1. MORTGAGE:
mistake in
description:
record notice
to subsequent
mortgagee.

In the index book in the recorder's office the property in the first mortgage was described as follows: "Lot 8 Zulauf's sub-division, Ottumwa, Sec. R." It is insisted that the defendants were charged with constructive notice of the mortgage executed in 1873. But we think this cannot be so. The property was situated in Zollar's addition. Now, no one would suppose, when looking up the title to property in that addition, that the entry in the index book had any reference to property in any addition except that of Zulauf.

But it is said that the mortgage described the property as being situated on the corner of Front and McLean streets, and that the defendants were charged with notice of this fact. But why? The index book made no reference to streets or where the property was situated, other than that it was lot 8 in Zulauf's sub-division.

It will be conceded that the letter "R" referred to the mortgage as recorded; but, applying what was said in *Breed v. Conley*, 14 Iowa, 269, to the case at bar, the searcher for encumbrances would have no occasion to examine the record, when the index book shows the property to be in Zulauf's sub-division. It is possible that the defendants would be charged with notice that the record contained a more full description of the property than that stated in the index book. But clearly, we think, the defendants cannot be charged with notice that the property mortgaged was in Zollar's addition, or that it was situated at the corner of Front and McLean streets.

II. The evidence satisfactorily shows that C. C. Peters

borrowed \$500 of the plaintiff, in 1873, and that he agreed to execute a mortgage to the latter to secure the money so borrowed, but no specific property was agreed upon which should be mortgaged. In pursuance of this agreement, the mortgage sought to be foreclosed, and executed in 1873, was delivered to and accepted by the plaintiff, prior to the execution of the mortgage under which the defendants claim. We are satisfied that C. C. Peters intended to mortgage the property in Zollar's addition, but that by mistake it was described as being in Zulauf's addition. The plaintiff accepted such mortgage under the belief that it was valid as security for the money loaned. Neither the mortgagor nor mortgagee had knowledge of the mistake until the day the mortgage to the defendant was executed.

Now, under the circumstances, was the mortgage between the parties thereto void, or could the mistake as between them have been corrected and the mortgage reformed in equity.

That this could readily be done, if the mistake was a mutual one, will perhaps be admitted. But it is contended that, although there may have been a mistake made by the mortgagor, this is not true as to the mortgagee, because he had no knowledge that the property was incorrectly described, nor had he contracted that any particular property should be mortgaged.

No sane man, however, would accept a mortgage as a valid security, which contained an impossible description of the property intended to be described therein; and in this case the mortgagee had the right to believe and rely on the fact that the property intended to be mortgaged by the mortgagor was correctly described in the mortgage. He had the right to expect at least this, and it must be presumed that he accepted the mortgage under such belief. Now, as the property was incorrectly described because of mistake, the mortgagee accepted the mortgage under the mistaken belief that the property was correctly described, and, as between him and the mortgagor, such mistake in equity could have been

corrected. This being so, it follows that the plaintiff is entitled to the same relief against the defendants, if they had express notice of the mortgage and mistake prior to the execution of the mortgage under which they claim. We have read the evidence with care, and unite in the conclusion that the defendants did have such notice. One of the defendants, Henry, so testifies, and so does C. C. Peters. Two of the defendants testify otherwise. Without stating our reasons, we deem it sufficient to say that the preponderance of the evidence is with the plaintiff.

The mortgagor, C. C. Peters, in executing the mortgage correcting the mistake, did no more than he could have been compelled to do. This mortgage was delivered to and accepted by the plaintiff, and it is immaterial whether or not this was done prior to the execution of the defendants' mortgage. This mortgage correcting the mistake relates back to, and the lien of the plaintiff dates from, the time the first mortgage was executed. This case is distinguishable from *Day v. Griffith*, 15 Iowa, 104, and *Cobb v. Chase*, 54 Id., 253, in this: The only question in those cases was as to whether there had been a delivery of the mortgages. In the case at bar, there is no such question as to the mortgage executed in 1873, for it undoubtedly was delivered long prior to the execution of the defendants' mortgage.

We are of the opinion that the circuit court erred in holding that the mortgage executed to the defendants was entitled to priority over the lien of the plaintiff's mortgages. The cause will be remanded with directions to enter a decree in accordance with this opinion.

REVERSED.

SPURGIN V. ADAMSON ET AL.

1. **Redemption: FROM MORTGAGE FORECLOSURE: BY JUNIOR LIEN-HOLDER NOT MADE A PARTY.** A junior lien-holder has in equity a right to redeem from a senior mortgage until that right is cut off by foreclosure, and it is not affected by foreclosure proceedings to which he is not made a party. Such equitable right to redeem is not taken away or abridged by the statute providing for redemption after foreclosure.
2. ———: ———: **OF HOMESTEAD BY JUDGMENT CREDITOR.** A mere judgment creditor has no lien upon the debtor's homestead, and he has no right to redeem the same from one who purchases it under the foreclosure of a senior mortgage.
3. ———: ———: **TERMS OF.** A junior incumbrancer, in making redemption from a senior mortgage, is required to pay the full amount of the mortgage debt, even though he seeks to redeem but a part of the mortgaged premises.
4. **Mortgage: PAYMENT OR PURCHASE OF: MERGER: REDEMPTION.** Where one obtains the legal title to land under the foreclosure of a mortgage made by another, and he afterwards purchases and has assigned to him a junior mortgage made by the same mortgagor upon the same land, under the circumstances revealed in this case, the transaction will not be regarded as a payment of the junior mortgage, and a judgment creditor not made a party to the foreclosure suit, and whose judgment is of later date than the junior mortgage thus purchased, cannot redeem in equity from such purchaser, without paying the amount of the junior as well as of the senior mortgage.
5. **Action in Equity: PARTIES DEFENDANT.** All the persons necessary to the full and final determination of the interests involved should be made parties to a suit in equity; but the rights and liabilities of such as are not made parties cannot be adjudicated.
6. **Redemption: FROM MORTGAGE FORECLOSURE: BY JUNIOR INCUMBRANCER NOT MADE A PARTY: TERMS OF.** One who purchases real estate under the foreclosure of a mortgage, to which a junior incumbrancer was not made a party, holds the property subject to redemption by such junior encumbrancer, and must account for the rents and profits of the premises while enjoyed by him, and is entitled to credit for improvements made and for taxes paid upon the land.

Appeal from Warren Circuit Court.

TUESDAY, JANUARY 29.

Action by a junior incumbrancer to redeem from a mort-

62	661
78	28
62	661
94	552
62	661
108	90
62	661
119	136
62	661
126	257
126	597

gage which had been foreclosed without making the incumbrancer a party to the foreclosure proceeding. The relief sought by plaintiff was granted by the decree of the circuit court. Defendant and an intervenor appeal. The facts of the case appear in the opinion.

Creighton, Hays & Creighton and Henderson & Berry,
for appellants.

Todhunter & Hartman, for appellee.

BECK, J.—I. The facts, as shown by the evidence and the admissions of the pleadings, are as follows:

1. November 30, 1872, Nathan Adamson and his wife, Amy J., executed a mortgage upon the S. $\frac{1}{2}$, S. W. $\frac{1}{4}$, Sec. 12, Twp. 75, R. 22 W. 5 P. M., to W. H. Schooley, upon which a decree of foreclosure was rendered, March 6, 1877, for \$354.60, and the land was sold thereon in separate parcels to Hugh R. Creighton, the east "forty," less three acres, for \$300, and the west "forty," less three acres, for \$87.50. The west "forty" was the homestead of Nathan Adamson and wife. The sheriff's certificates issued upon the sale of these lands were assigned to Joseph Adamson, and two deeds, one for each "forty," were executed to him by the sheriff May 4, 1878.

2. Plaintiff in this case, on the 13th day of January, 1877, recovered two judgments against Nathan Adamson for the aggregate amount of \$312.55, upon which the east "forty" (less three acres) was sold, and a deed was made to plaintiff therefor, March 7, 1878.

3. Plaintiff was not made a party to the foreclosure proceedings of the Schooley mortgage, and by this action he seeks to redeem, under his equity of redemption, the east "forty," and to recover the rents and profits of the land, which has been in possession of defendants, and asks that an accounting be had therefor.

4. On the 8th day of December, 1873, Nathan Adamson

and wife executed a mortgage, covering all of the above described land, to Farr, to secure \$700, which was transferred to the defendant, Joseph Adamson.

5. Joseph Adamson acquired the sheriff's deeds under the Schooley foreclosure, and the assignment of the Farr mortgage, as a trustee for the intervenor, Amy J. Adamson, and holds the same for her use and benefit.

6. The evidence shows that Joseph Adamson executed a mortgage, for money borrowed, to the Hartford Life & Annuity Insurance Company upon the lands, which was used in payment for the transfer of the Farr mortgage, assigned, as just stated, to him.

The decree of the district court provides that the Adamsons may redeem from the sheriff's sale made to plaintiff, within a time specified, by paying the amount bid by him, with interest at ten per centum per annum from the date of the sale, and, if they fail to make such redemption, the plaintiff may redeem all the lands sold upon the foreclosure of the Schooley mortgage, upon paying the amount bid, namely, \$387.50, with ten per centum per annum interest from the day of sale. The decree further provides that, in case the Adamsons fail to pay the mortgage to the Hartford Life & Annuity Insurance Company, the plaintiff shall retain from the money to be paid by him to redeem the land a sum equal to the amount of that mortgage and the interest thereon, and shall thereupon become personally liable therefor to the Insurance Company. The decree declares that plaintiff, upon redemption from the Schooley mortgage, shall become vested with all the rights and interest, acquired under the sheriff's deeds by the Adamsons.

II. It is insisted that the only right of redemption held by plaintiff was that conferred by the statute, and that, as the time within which that right may be exercised under the statute had expired before this suit was brought, he is not entitled to redeem from the mortgage. It cannot be doubted that he lost the

1. REDEMPTION: from mortgage foreclosure: by junior lienholder not made a party.

statutory right to redeem, and we do not understand that he claimed it.

But the plaintiff, as the holder of a lien upon the property, has, in equity, a right to redeem until that right is cut off by foreclosure. As this was not done, and he was not made a party to the action to foreclose, he retains this equitable right. Defendants insists that this equitable right of redemption is merged in the statutory right, and limited, as to the time of its exercise, by the provisions of the statute. There is nothing to be found in the statute taking away the equity of redemption and substituting therefor the statutory redemption. Code, § 3321, provides that sales of land under foreclosures of mortgages are subject to redemption as in cases of sales upon general executions. Under this statute, an incumbrancer, or one holding an interest in the land, which, under the statute, would give him the right to redeem, may exercise that right within the time prescribed by the statute, although he was a party to the foreclosure action, and his equity of redemption was cut off by the decree of foreclosure. The equity of redemption ceases to exist after the expiration of the time fixed by the decree of foreclosure, or the rules of chancery applicable thereto. The statute, under our view, confers a right upon the junior incumbrancer not given by chancery. By its terms it does not limit the right of redemption before existing under the rules of equity. That right is, therefore, not taken away by it. It was not the purpose of the statute, in conferring this right of redemption, to take away another and different right recognized by equity. The equity of redemption exists independent of statute, and will be enforced by the courts of chancery until it is taken away by express legislative enactment.

III. The plaintiff's judgments were not liens upon that portion of the lands occupied as a homestead. The equity of redemption exists only in favor of those who hold liens upon, or some interest in, the mortgaged property. Plaintiff, having no such lien or interest, holds no equity of redemption. His right of re-

2. —: —: i
of homestead
by judgment
creditor.

Spurgin v. Adamson et al.

demption under the statute had expired before he instituted this proceeding. The circuit court, therefore, erred in permitting plaintiff to redeem the homestead.

IV. The Farr mortgage was a lien on the lands superior to plaintiff's judgments. Plaintiff cannot and ought not to a. —: —: hold the land upon his judgment and sale, with-
terms of. out redeeming from this mortgage. It is now held, under an assignment, by Joseph Adamson; plaintiff must redeem from it as well as the Schooley mortgage before he can enforce his judgments. *Holliday v. Arthur*, 25 Iowa, 19. To avoid another action, all the parties in interest being before the court in this case, the decree ought to provide for the exercise of this right of redemption, and the terms upon which the redemption should be made. A junior incumbrancer, in making redemption from a senior mortgage, is required to pay the full amount of the mortgage debt. *Johnson v. Harmon*, 19 Iowa, 56; *Knowles v. Rablin et al.*, 20 Id., 101. And a purchaser or junior mortgagee of a part of the mortgaged premises, in order to redeem, is required to pay the whole debt secured by a prior mortgage. *Douglass et al. v. Bishop*, 27 Iowa, 214; *Knowles v. Rablin et al.*, *supra*; *Street v. Beal & Hyatt*, 16 Id., 68; *Massie v. Wilson*, Id., 390. Plaintiff, in order to redeem from the Farr mortgage, must pay the whole mortgage debt secured by that mortgage.

V. Plaintiff claims that the evidence shows that Joseph Adamson "paid off" the Farr mortgage. The evidence clearly 4. MORTGAGE: proves that Joseph Adamson borrowed from the
payment or
purchase of: Hartford Life & Annuity Insurance Company
merger: re- money which he applied to the purchase of the
demption. Farr mortgage. He secured the company by a mortgage upon the lands before mortgaged to Schooley, which, it will be remembered, he acquired under the foreclosure, as we have explained above. The Farr mortgage was assigned to him, and he executed a proper instrument whereby it was made

 Spurgin v. Adamson et al.

junior to the mortgage to the insurance company. It will be remarked that Joseph Adamson was not the mortgagor in the Schooley mortgage. It was executed by Nathan and Amy J. Adamson. The evidence clearly shows that the transaction was not the payment of the Farr mortgage by Joseph Adamson, but was a purchase and assignment of that instrument to him. As the mortgage remains unsatisfied, and is a lien senior to plaintiff's judgments, plaintiff must redeem therefrom by payment of the amount due thereon. *Holiday v. Arthur, supra.*

VI. The mortgage executed by Joseph Adamson to the insurance company is shown by the abstract before us to be junior to plaintiff's judgments. The rights and liabilities of the parties under that mortgage cannot be determined now, as the holder thereof is not a party to this suit. It may be that, if that mortgage was a lien senior to plaintiff's judgments, he would be permitted to apply a sufficient amount of the sum which he is required to pay to redeem under the Schooley and Farr mortgages, to the payment of that mortgage, and have credit accordingly. It may also be that the insurance company can redeem from plaintiff's judgments, and, if it may do so, it possibly would not be required to pay the amount of the Farr mortgage. And it may be, too, that, if it cannot do so, and its mortgage cannot in any manner be enforced against the land, then, on the ground that defendant is personally liable for the debt attempted to be secured on the land, the amount thereof ought to be considered in determining the sum to be paid by plaintiff. These questions cannot be determined until the insurance company is made a party to the action, which ought to be done when the case is remanded, to the end that the rights of all persons concerned may be settled.

VII. The evidence shows that Joseph Adamson acquired the land under the sheriff's sale, upon the foreclosure of the

5. ACTION in equity: parties defendant.

Spurgin v. Adamson et al.

6. REDEMPTION from mortgage foreclosure: by junior lienholder not made a party: terms of.

Schooley mortgage, for the intervenor, Amy Adamson. The arrangement between them was, in effect, that he should purchase the land, advancing the money for that purpose, and hold the title of the property until she should repay him. Amy remained in possession, and has received the rents and profits of the land. Joseph holds the land in trust for Amy to secure the amount advanced by him. If he is to be regarded as a creditor of Amy, holding the land as a mortgagee, plaintiff is not required to redeem from him, for the reason that the debt and equitable mortgage, arising by reason of the conveyance to him to secure the advances made, were subsequent to plaintiff's judgments. On the other hand, if he is simply a trustee for Amy, and the parties seem to so regard him, his rights are not other or different from those which would be held by Amy, were the title of the land in her own name. He is, therefore, to be regarded as the purchaser of the lands at the foreclosure sale; not as the mortgagee of Amy. A mortgagee in possession of land, either before foreclosure, or under a foreclosure sale and a deed made thereon, must account for rents and profits, and, in a proper case, be credited for improvements, upon redemption by a junior incumbrancer. *Montgomery v. Chadwick*, 7 Iowa, 114; *Ten Eyck v. Casad & Rowley*, 15 Id., 524; *Green v. Turner*, 38 Id., 112. This doctrine is recognized in *Dungan v. Von Phul*, 8 Id., 263; *Johnson v. Harmon*, 19 Id., 56, and *Gower v. Winchester*, 33 Id., 303.

A purchaser under a foreclosure of a mortgage, as to a junior incumbrancer entitled to redeem for the reason that he was not made a party to the foreclosure proceeding, is regarded as the assignee of the mortgage, and holds no other rights than would be held by the mortgagee, were redemption made while the mortgage was held by him, or were he the purchaser at a foreclosure sale. *Anson v. Anson*, 20 Iowa, 55. The defendant and intervenor, under these decisions, must account for rents and profits, and have credit for im-

Iselin et al. v. Griffith.

provements made by them upon the land. They should be credited, also, with taxes paid. See *Anson v. Anson*, *supra*. The foregoing discussion disposes of all questions in the case. The cause will be remanded to the court below, with directions that plaintiff be required to make the Hartford Life & Annuity Insurance Company a defendant. After its rights shall be determined upon pleadings and evidence to be submitted by it, or by its default, if it fail to appear, decree will be entered in harmony with this opinion.

REVERSED.

ISELIN ET AL. V. GRIFFITH.

1. **Contract to Sell Land: PERFORMANCE: FACTS NOT CONSTITUTING.**

Where, by the terms of a contract, a real estate agent, upon "finding a purchaser" for a tract of land, was to receive certain compensation for his services, and he found one who said that he would take the land, but the owner, having then sold the land to another, was unable to make a deed to the agent's alleged purchaser, *held* that the agent could not recover the agreed compensation, without showing that the purchaser found by him was in a condition to comply with the contract, or to respond in damages for a failure so to do.

2. **Practice in Supreme Court: OBJECTION TOO LATE.** A discrepancy between the allegations and the proof cannot be urged for the first time in this court.3. **Evidence: PRACTICE: CONTRADICTING ONE'S OWN WITNESS.** A party is never precluded from introducing other evidence contradicting the statements of his own witness. And so, where plaintiffs introduced defendant's answer as evidence on their behalf, they were not bound by the denials therein contained, but could show by other evidence that the things denied were true.*Appeal from O'Brien District Court.*

WEDNESDAY, JANUARY 30.

ACTION to recover compensation for negotiating the sale

68	668
81	761
62	668
90	393
62	668
98	407
62	668
124	180
124	490
62	668
125	388
125	388
62	668
130	87
130	537
62	668
132	252
62	668
139	305

of two tracts of land. The cause was sent to a referee, and, upon his report, judgment was rendered for plaintiffs. Defendant appeals.

Barrett & Bullis, for appellant.

J. B. Emmes, for appellees.

BECK, J.—I. The petition alleges that defendant, by an oral contract, employed plaintiffs to negotiate the sale of certain land. By the terms of the contract, plaintiffs “were to find a purchaser, or endeavor so to do,” and were to receive as compensation whatever the land sold for above \$6.50 per acre. It is alleged that plaintiffs “did find a purchaser” for the land at the price of \$9 per acre, “who were ready and willing to pay, and offered to pay that price in cash” for the land, and that defendant was notified thereof, and plaintiffs requested him to execute a deed to the purchaser, which he refused to do, and sold the land to another.

Defendant in his answer admits that he authorized plaintiffs to sell the land, and the allegation of the petition as to plaintiffs’ compensation. He also admits that he sold the land to another after he had received notice of the sale by plaintiffs.

The referee returned the following finding of facts:

“The undersigned, referee in the above entitled case, respectfully reports the following facts deduced from the evidence presented, viz:

“1st. The defendant, Reuben Griffith, did, in the month of March, 1882, place the north half of the northwest quarter of section 24-95-42 (of which he was owner) in the hands of plaintiffs for sale, at \$6.50 per acre net to him, plaintiffs to have all they could get above that price.

“2d. That plaintiffs did not have the exclusive sale of said land, and they so understood it.

“3d. That defendant sold said land to a Mr. Gray, on the tenth day of April, 1882.

"4th. That defendant neglected to inform plaintiffs that he had sold the land, until the fourteenth day of April, 1882, and that plaintiffs and defendant lived and did business in the town of Sheldon.

"5th. That plaintiffs offered said land to Walbridge & More, of Cherokee, Iowa, by mail, on the tenth day of April, 1882, at \$9 per acre.

"6th. That on the twelfth day of April, 1882, Walbridge & More accepted said offer by mail, which was received by plaintiffs on the thirteenth of April.

"7th. That on the thirteenth day of April, 1882, plaintiffs notified defendant that they had sold said land, and demanded him to make deed.

"8th. That, on the thirteenth day of April, defendant placed in mail, at Sheldon, a notice to plaintiffs that he withdrew his land from them; that said notice was not received by plaintiffs till noon of the fourteenth day of April, 1882.

"9th. That defendant placed said lands in hands of plaintiffs at \$6.50 per acre net to him, sale to be on time, at 8 per cent interest."

The defendant excepted to the referee's report, upon the grounds that it fails to show that the referee found that the purchaser secured by plaintiff was able and ready to make the purchase, and possessed of the money to pay for the land, and that these facts were not established by the evidence; that the findings are not supported by the evidence in other specified particulars; and that plaintiffs are concluded by the answer of defendant, which they offered in evidence.

II. It will be observed that the referee found that plaintiffs offered the land to a firm who accepted the offer, but did not find that the firm was ready, or possessed of the ability, or were in a condition, to purchase the land. There was no evidence introduced at the trial upon these points.

We think that, in order to entitle plaintiffs to recover, something more than a mere offer to purchase should be

1. CONTRACT
to sell land:
performance:
facts not con-
stituting.

shown by them. Such an offer could be made by one without means, and who is in no condition to comply with the terms of the sale, and against whom a claim for damages, resulting from a failure to perform the contract of purchase, could not be enforced. An offer from such an one ought not to be considered as constituting the performance of plaintiffs' undertaking to negotiate the sale of the land. As the pecuniary responsibility of the purchasers was or ought to have been known to plaintiffs, and as upon it depended the performance of their contract with defendant, the burden rested upon them to show it. These conclusions are supported by *Coleman's Ex'rs v. Mead*, 13 Bush, 358, and *McGavock v. Woodlief*, 20 How., 221. *Contra*, see *Cook v. Kroemeke*, 4 Daly, 268, and *Hart v. Hoffman*, 44 How. Pr., 168.

III. Plaintiffs allege in their petition that the sale they negotiated was for cash, while the referee finds, upon undisputed evidence, that it was for one-third cash, and the balance at eight per centum per annum interest. This discrepancy between the *allegata* and *probata* is urged upon our attention as a ground for reversing the judgment of the district court. But it was not made in the court below by exceptions to the referee's report, or otherwise. It cannot be first urged in this court.

IV. The plaintiffs introduced the defendant's answer in evidence. It admits that plaintiffs were employed to sell the lands, the compensation to be paid them as alleged in the petition, and the sale of the lands by defendant. Other allegations of the petition are denied. Counsel urges that plaintiffs are bound by the denials of the answer. Regarding the whole answer as evidence, it was not conclusive, and plaintiffs could and did introduce evidence contradictory to the denials it contained. If the defendant's answer is to be regarded as his testimony given upon plaintiffs' motion—he being considered a witness for plaintiffs, they could contradict its statements by other evidence. A party is never precluded from giving other evi-

2. PRACTICE
in supreme
court: objec-
tion too late.

3. EVIDENCE:
practice: con-
tradicting
one's own
witness.

 Townsend v. Wisner.

dence contradicting the statements of his own witness. The answer was to be weighed with other evidence, and, doubtless, this was done by the referee. The foregoing discussion disposes of all questions presented by counsel which need be considered upon this appeal. The judgment of the district court, for the error in overruling defendant's exceptions to the report of the referee, is

REVERSED.

TOWNSEND V. WISNER.

1. **Practice: REHEARING OF MOTION.** A motion once overruled cannot be called up again for rehearing by the party who made it, until, upon proper notice to the other party, the order overruling it has been set aside.

Appeal from Hardin Circuit Court.

WEDNESDAY, JANUARY 30.

ACTION upon covenants of warranty. Judgment was rendered for the plaintiff, and the defendant appeals.

Porter & Albroom, for appellant.

Tom H. Milner, for appellee.

ADAMS, J.—The defendant demurred to the plaintiff's petition. The plaintiff filed a motion to strike the demurrer from the files. The court, upon hearing, overruled the motion. Afterward the plaintiff called up the motion again for hearing, and the court sustained the motion, and ordered that the demurrer be stricken from the files, to which action of the court the defendant excepted. The case in that condition was referred to a referee. No answer was filed. A hearing was had before the referee, at which, however, the defendant did not appear. Some evidence was taken, and a report filed by the referee in favor of the plaintiff, which the court affirmed. Several questions are presented by the defendant,

68	672
115	832
62	672
143	186

but it will, we think, be necessary to consider but one, and that arises upon the action of the court in reference to the motion to strike the demurrer from the files. The motion to strike having been overruled, it appears to us that it was no longer pending, and was not subject to be called up again at the pleasure of the plaintiff, and reheard, so long as the order overruling it stood. The correct practice on the part of the plaintiff would have been, we think, to have filed a motion to set aside the order, setting out the grounds of the motion and serving a copy on the other side, if required to serve such copy by the rules or practice of the court. If the order had been set aside, the motion would again have been pending, to be disposed of in such way as the court should deem proper. If a motion which has been disposed of can be called up once by the unsuccessful party and be re-heard, as if no ruling had been made, it might more than once, and the result would be that motions passed upon might be deemed as always virtually pending, at least in the sense that they were subject to be re-heard at any time at the pleasure of the party who was last unsuccessful. If we are correct, the case strictly was pending on demurrer at the time it was referred. But in no view was it ripe for reference, the issues not having been formed. Code, § 2827.

The case is full of irregularities and complications. How far the appellant's counsel is responsible for them we need not determine. The questions necessarily involved in the outset were simple enough. If the case shall be tried again, it is to be hoped that those questions, and those alone, will arise for determination. The judgment of the circuit court must be reversed.

We ought, perhaps, to say that the appellee has filed a motion and amended abstract, assailing the record upon the ground that no bill of exceptions was filed.

The question above determined arises upon the record without a bill of exceptions.

REVERSED.

AULTMAN V. MOUNT.

1. **Prior Adjudication : FACTS CONSTITUTING.** Where an agent for the sale of machinery took from the purchaser of a certain machine three notes, payable to his principals, and, under a mistaken apprehension of his duty to his principals, he himself guaranteed the notes, an adjudication in his favor, in an action upon his guaranty of one of the notes, on the ground that his contract with his principals did not require him to guarantee the notes, and that the guaranty was made by mistake, was decisive of his liability upon all the notes, as between the same parties; and, in an action between the same parties upon the other two notes, a demurrer to an answer setting up these facts should have been overruled.

Appeal from Montgomery District Court.

WEDNESDAY, JANUARY 30.

ACTION to recover upon a guaranty of two promissory notes executed by one Snygg to C. Russell & Co., the plaintiff's assignors.

The defendant for answer averred that the guaranty was made without consideration. He also, as a second defense, pleaded a prior adjudication. To so much of the answer as set up a prior adjudication the plaintiff demurred, and the demurrer was sustained, to which ruling the defendant excepted. The parties then proceeded to trial upon the other issue, to-wit, as to want of consideration; and judgment was rendered for the plaintiff. The defendant appeals from the ruling on the plaintiff's demurrer.

McPherson & Murphy, for appellant.

C. E. Richards and *R. W. Beeson*, for appellee.

ADAMS, J. The answer shows that the defendant, Mount, was acting as agent for C. Russell & Co. in selling agricultural machinery; that as such agent he sold a piece of machinery to Snygg, and Snygg executed to C. Russell & Co. therefor his three promissory notes; that at the same time Mount endorsed

his guaranty thereon, and delivered them to C. Russell & Co.; that, while he was acting under a written contract with C. Russell & Co., such contract required only good faith and diligence, and did not require him to guarantee the notes, and that in indorsing his guaranty thereon he made a mistake; that action was brought upon the guaranty of one of the notes against this defendant, and in that action he pleaded the mistake and want of consideration, and judgment was rendered in his favor; that that action was between the same persons that this is, and this is brought upon the other two notes, and the same defense is now set up that was set up in that; that the plaintiff's title and ownership to said note sued on in the former action, "and his alleged right to recover thereon, were and are the same as his title and ownership and right, if any, to recover on the notes declared on in this action." The answer further avers that "all of the said acts of Snygg and this defendant concerning said notes constituted but one transaction."

The execution of three different contracts of guaranty were three different acts. If they were distinct and independent acts, an adjudication upon one guaranty would not appear to be an adjudication upon either of the others, and that, too, even though the same question of law were presented. To constitute a prior adjudication there must have been something more than an adjudication of a common question of law. There must have been an adjudication respecting some common thing. Does the answer show that there was such adjudication in the former action? In our opinion it does.

The defendant, as we have seen, was acting under a written contract. The real question in dispute between these parties in the outset, we apprehend, was as to the construction of that contract. The answer is not very full upon this point, but it is full enough, we think, to warrant us in this conclusion. It contains an averment that the defendant's acts concerning the notes *were but one transaction*. The demurrer admits this. Taking this to be true, there were not properly

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three mistakes, but only one. There must, then, have been some common mistake lying behind the three acts, by which the different endorsements were made. If the original contract between the defendant and C. Russell & Co. obligated him to guarantee the notes, then his indorsement of such guaranty, though consisting of three acts, would be essentially one transaction; and the same would be true if the endorsement was made under a mistaken supposition that the contract created such obligation, whether the mistake arose from a wrong construction of the contract, or forgetfulness of its provisions. Taking the averments above set out to be true, we think that the point adjudicated in the former action must have been that the contract did not create an obligation to guarantee the notes. That contract, then, constituted the common thing respecting which there has been an adjudication, and a court cannot, as between the same parties, properly be asked to make an adjudication respecting it again.

We think that the averments of the answer were sufficient to show a prior adjudication, and that the plaintiff's demurrer to it should have been overruled.

REVERSED.

VOTAW & HARTSHORN v. DIEHL, SHERIFF, ET AL.

1. **Bill of Sale: ABSOLUTE ON FACE—MORTGAGE IN FACT: EVIDENCE**
Where the title of goods under a bill of sale is involved in an action, it is competent to show that the bill of sale, though absolute in its terms was intended as security for a debt.

2. **Evidence: ERROR IN EXCLUDING: CORRECTION ON APPEAL: PRACTICE.**
Where evidence of a conversation was excluded, and the abstract fails to show what facts were sought to be established thereby, this court cannot say that the proposed evidence was material, nor that there was error in excluding it. (Compare head-note 6 below.)

3. **Practice in Supreme Court: ERRORS MUST BE SHOWN IN RECORD.**
Rulings complained of in argument, but which do not appear in the record, cannot be reviewed.

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4. **Instructions: REPETITION NOT REQUIRED.** There is no error in refusing instructions asked, when the rules of law therein embodied are in substance announced in other instructions given.
5. **Verdict: EVIDENCE TO SUPPORT: PRACTICE IN SUPREME COURT.** This court cannot decide that the trial court erred in refusing to set aside a verdict, in a case where it cannot be said that the jury, in the exercise of their unbiased and intelligent discretion, could not have found as they did.

UPON REHEARING.

6. **Evidence: ERROR IN EXCLUDING: CORRECTION ON APPEAL: PRACTICE.** Where it is apparent upon the face of a question what the evidence sought to be introduced is, and that it is material, this is sufficient to secure a review, on appeal, of the ruling of the court sustaining an objection to the question; but where this is not apparent, then the party seeking to introduce the evidence is required to state what he expects to prove, and thus make its materiality appear of record.

Appeal from Wright Circuit Court.

WEDNESDAY, JANUARY 30.

ACTION OF REPLEVIN. There was a judgment upon a verdict for plaintiffs. Defendants appeal. The facts of the case involved in the questions decided appear in the opinion.

Brown & Carney, for appellants.

Chase & Chase, for appellees.

BECK, J.—I. The plaintiffs allege that they are the absolute and unqualified owners of the property in question, a stock of general merchandise, which was seized by defendants upon certain attachments issued against one H. M. Waite.

The answer shows the attachments upon which the goods were seized—all against Waite, and alleges that plaintiffs' claim upon a pretended sale of the goods, which was made with the purpose of defrauding Waite's creditors on the part of plaintiffs and Waite, as well as of one Patterson, who was connected with the transaction.

The questions in the case upon which there arises any dispute involve the good faith of plaintiffs' purchase of the goods.

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There is no controversy about the sale of the goods, their seizure by the plaintiffs upon the attachments, or upon other issues in the case not involving the good faith of the transaction.

We will consider the objections to the judgment in the order of their discussion in the argument of defendants' counsel.

II. Patterson testified that he bargained for the goods, and, in order to make a payment, borrowed the money of plaintiffs. To secure them, he caused Waite to execute a bill of sale to plaintiffs. This was done for the reason that Patterson had not then the possession of the goods. This evidence, so far as it shows that the bill of sale was intended as a security, was objected to by defendants, on the ground that it tended to contradict the bill of sale, which is absolute in its terms. We think the objection was correctly overruled. It is competent to show that a sale, absolute in its terms, is intended as security for a debt. This is always the case when rights under the sale are brought in question. The title of the goods under the bill of sale was involved in the action, and its true character should be established in order to determine the rights of the parties affected thereby.

III. The witness, Patterson, was asked upon his cross-examination by defendants, to state a conversation he had with one Humphrey, an attorney, who held for collection a claim against Waite. The court sustained an objection to the question made by plaintiffs. This ruling is complained of by counsel for defendants. The abstract fails to show the facts sought to be elicited by the question. To enable us to determine whether the proposed evidence is competent, we should be advised of its character and the facts which defendants claimed would have been established by it. *Jenks v. Knott's Mexican Silver Mining Co.*, 58 Iowa, 549.

IV. Plaintiffs objected to evidence given by the witness

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Humphrey, of a conversation which he had with the deputy sheriff about the time the goods were seized.

THE SAME.

The objection was sustained. The record does not disclose the conversation, nor the facts proposed to be established thereby. The ruling cannot be reviewed, for the reasons given in the preceding point.

V. Complaint is made that the circuit court erroneously excluded the evidence of one McKay, touching reports he had from commercial men of Waite's financial condition. The abstract does not show the rulings complained of, nor the offer to introduce the evidence of McKay, as claimed in the argument of counsel.

3. PRACTICE
in supreme
court: errors
must be
shown in
record.

VI. The refusal of the court to give to the jury certain instructions requested by defendants is complained of by defendants. These instructions direct the attention of the jury to facts and circumstances regarded by the law as badges of fraud. They also inform the jury that knowledge of fraud by plaintiffs, or of facts and circumstances casting suspicion upon the transaction, which were sufficient to prompt a prudent man to inquiry that would have resulted in the discovery of fraud, if shown, defeats the sale. The same rules were in substance announced in the instructions given to the jury.

4. INSTRUCTIONS: repetition not required.

VII. The instructions given to the jury are expressions of the law quite favorable to defendants. We discover no just ground of complaint against them. Their scope and character are indicated by what we have said in the preceding point.

VIII. The evidence sufficiently supports the verdict. While it cannot be doubted that the sale was made under very suspicious circumstances, which tended to establish fraud on the part of all concerned, yet it was the peculiar province of the jury to weigh these circumstances with other facts proved. We are not prepared to hold that the jury, in the exercise of their un-

5. VERDICT: evidence to support: practice in supreme court.

Votaw & Hartshorn v. Diehl, Sheriff, et al.

biased and intelligent discretion, could not have found for plaintiffs. This we would be required to do to authorize us to decide that their verdict should have been set aside by the court below.

We have considered all questions discussed by counsel. The judgments of the circuit court must be

AFFIRMED.

OPINION UPON REHEARING.

BECK, J.—I. A rehearing was granted in this case at a former term, and it has again been submitted upon the argument of counsel.

We entertained no doubts upon the questions decided in the foregoing opinion, except those involved in the third and fourth points. Upon a careful reconsideration of the abstract, and the application of the rule recently settled by this court, which controls in determining whether evidence objected to is made to appear with sufficient clearness in order to authorize us to determine its admissibility, we are satisfied all our conclusions are correct. The rule is stated by Mr. Justice SEEVERS in these words: "The true rule, we think, is that, when it is apparent upon the face of the question asked the witness what the evidence sought to be introduced is, and that it is material, this is sufficient; but when this is not apparent, then the party seeking to introduce the evidence is required to state what he expects to prove, and thus make its materiality appear." *Mitchell v. Harcourt*, ante, p. 349.

The abstract shows the examination of the witness Patterson, touching the excluded evidence, in the following language. Nothing farther relating thereto is found in the abstract:

"Q. Now, didn't you see Mr. Humphrey on that morning and say to him, 'I have a customer that I think will buy Waite out,' and Humphrey says, 'he won't pay Waite over fifty cents on the dollar, and it won't pay the claims,' and

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didn't you say then, 'that is more than Waite will get if his creditors shut down on him?'

"A. I had a conversation with Humphrey, but that wasn't it in substance. No, sir.

"Q. Now state the conversation you did have with him.

"[Objected to as not proper cross-examination, immaterial and incompetent. Sustained. Defendants except.]"

What that conversation was, or even what it was about, and whether it related to a matter in issue, cannot be determined, or even inferred, from this quotation from the abstract. Under the foregoing rule, we cannot exercise presumption as to the character and substance of the evidence, and cannot attempt to determine its admissibility.

II. The evidence referred to in the fourth point of our
THE SAME former opinion is with less certainty and explicitness alluded to in the abstract. We quote all that is found therein relating to the evidence and the ruling of the court in question:

"After I went to the door of Votaw & Hartshorn's office, and found it locked, and rapped and got no response, I found the deputy sheriff, and directed him to levy on the goods and books, and he carried them out of the building, and I directed him to hold possession of the store and goods, and we commenced to invoice after dinner.

"[Plaintiffs object to and move the court to strike out all that part of the witness' testimony relating to the conversation with the deputy sheriff, because his return is the best evidence of what was done. Objection sustained and motion granted, and defendants except.]"

What was the conversation here referred to does not appear. It could not have been the directions to levy, for they do not appear to have been replied to; and a simple direction without a reply cannot be called a conversation. Neither would a direction necessarily appear upon the officer's return, and we cannot presume that the court so decided. It is probable that the conversation may have related to some act that

State v. George.

ought to have been shown by the return. If that was so, the court's ruling was correct, for the return is the best evidence. But we can exercise no presumption as to the fact or substance of the evidence which was excluded. We adhere to the conclusion announced in the foregoing opinion, that the judgment of the circuit court ought to be affirmed.

STATE V. GEORGE.

1. **Criminal Practice: CHALLENGE TO JUROR: ERROR WITHOUT PREJUDICE.** Where the defendant in a criminal case challenged a juror for cause, and the challenge was overruled, and the defendant afterwards challenged the juror peremptorily, without exhausting all his peremptory challenges, the error, if any, in overruling the challenge for cause, was without prejudice to defendant.
2. ———: ———: **QUALIFIED OPINION AS TO GUILT.** An opinion of a juror that the defendant is guilty, provided what he (the juror) has heard about the case is true, is not an unqualified opinion, and for the judge so to state during the examination of a juror was not error, nor was it prejudicial to the defendant, where his challenge—the one under consideration—was sustained.
3. ———: **GRATUITOUS REMARKS OF JUDGE: NOT COMMENDED, BUT NO GROUND FOR REVERSAL.** Certain extended remarks made by the trial judge during the examination of jurors in this cause, pertaining to the intention of the legislature, and the effect of the statute in relation to murder, (see opinion,) while not regarded as being in consonance with the practice in this state, *held*, under all the circumstances, to have wrought no prejudice to defendant.
4. **Murder: INSANITY AS A DEFENSE: EVIDENCE CONSIDERED: INFERENCE FROM EPILEPSY.** Epilepsy is not necessarily such evidence of insanity as to excuse the subject of it from criminal responsibility; and, upon consideration of all the facts in this case, *held* that a verdict of guilty of murder in the first degree, and sentence of death, could not properly be set aside by this court on the ground of insanity.
5. ———: **INSTRUCTIONS TO JURY: STARE DECISIS.** The law as announced in the opinion of this court in *State v. Felter*, 25 Iowa, 67, which assumes to direct the method of instructing a jury in murder cases, has been too long followed and acquiesced in to be now questioned; and the instructions in this case, being in accord with that opinion, are approved.

Appeal from Polk District Court.

WEDNESDAY, JANUARY 30.

THE defendant was indicted for murder in the first degree. He was tried, found guilty, and sentenced to death. He appeals to this court for a reversal of the judgment against him.

Seward Smith, for appellant.

Smith McPherson, Attorney-general, for State.

ROTHROCK, CH. J.—I. The first point in the argument by counsel for the defendant pertains to certain rulings of the court in passing upon challenges to persons called to serve as jurors in the case. An examination of *A. G. Groves*, a person called as a juror, was had, and he was challenged by the defendant for cause, and the challenge was overruled. It appears, however, that *Groves* did not serve as a juror, but that defendant challenged him peremptorily, and did not exhaust all of his peremptory challenges. If, therefore, the overruling of the challenge for cause was erroneous, it was error without prejudice. *State v. Elliott*, 45 Iowa, 486; *State v. Davis*, 41 Id., 311; *Barnes v. Town of Newton*, 46 Id., 567.

Some objection is made to some remarks of the court defining what is and what is not an unqualified opinion of the
 1. CRIMINAL practice: challenge to juror: error without prejudice.
 2. — : — : qualified opinion as to guilt.
 guilt or innocence of the defendant. These remarks were made pending the examination of a person called to serve as a juror. We think the definition given by the court was correct. It was to the effect that an opinion that the defendant is guilty or innocent is an unqualified opinion, but that if the opinion is guarded by the conditions that, if what the juror had heard about the case be true, then the defendant is guilty or not guilty, then the opinion is qualified, in the sense that the juror does

not know whether what he had heard is true or false. No prejudice resulted to the defendant by this remark. The person under examination as a juror was challenged by the defendant for cause, and the challenge was sustained.

W. W. Carpenter and H. Parks, upon their examination as to their qualification as jurors, answered that they had conscientious scruples against inflicting capital punishment. The state challenged them for cause, and the defendant objected to the challenge, because it was not by statute made a cause of challenge. The challenge was overruled, and the court thereupon made the following remarks upon the subject:

3. ———: gratuitous remarks by judge: not commended, but no ground for reversal.

“ * * * They may say: ‘We, the jury, find F. W. George guilty of murder in the first degree, as charged in the indictment, and determine that he shall be hanged by the neck until he is dead;’ or, leaving that out, they may say, ‘and determine that he shall be confined in the penitentiary for and during the term of his natural life.’ Then, the governor can pardon him out. But if they find him guilty of murder in the second degree, and they send him to the penitentiary for life, then the governor can pardon him out the very same day, if he thinks best.

“When the legislature enacted this statute, it seems to me that they ought to have provided for this emergency. If the court should decide here that this is not a good cause for challenge, the supreme court might reverse it. If he should decide that it is a good cause for challenge, and put the juror off, the supreme court might reverse that. It is in just such a tangle that we would not complain, let them decide it whichever way they would. That is the fix it is in.

“I think that we gather from the statute that, when it is proved to a moral certainty that a person is guilty of murder in the first degree, willful and premeditated killing, especially of an atrocious nature, that it would be well to hang him. I think that is the idea they, the legislature, had.

“I believe the statute ought to provide that it should be

cause for challenge if a man said he was conscientiously opposed to hanging anybody, and that he would not do it for any kind of murder whatever. It ought to be cause for challenge. Now, if we say that the only causes for challenge are those laid down in the statute, then I do not believe that the statute provides for this case. I do say that when they, the legislature, enacted this statute in regard to capital punishment, they should have provided for that, and not having done so is equivalent to saying that no man is to be hanged in this country, no matter how cruel and beastly a murder he may have committed."

It is claimed that the defendant was prejudiced by these remarks.

We are free to say that it would have been better, and more in consonance with our practice, if the court had omitted these remarks. The challenge had been sustained, and that was an end of the matter. What is complained of is not in the nature of an opinion, but seems to be some observations as to what in the judgment of the court was the legislative intent, and what the legislature might have done. The court seemed to think that the legislature had the idea, "when it is proved to a moral certainty that a person is guilty of murder in the first degree, willful and premeditated killing, especially of an atrocious nature, that it would be well to hang him." It cannot be doubted that the statute authorizes the infliction of the death penalty.

But, however the jury may have regarded the remarks last above quoted, the closing part of what was said by the court was favorable to the defendant, because it is there stated that the legislature have said, in effect, that "no man is to be hanged in this country, no matter how cruel and beastly a murder he may have committed." And the court in its instructions to the jury used this language: "It is your duty as jurors to try and determine this case according to the evidence produced and submitted to you in open court on this trial, and the law as given to you by the court in these instructions, and upon nothing else."

We conclude, under these circumstances, and considering the fact that the remarks complained of were made before the jury was made up and impaneled, and were not addressed to the jury or intended for their consideration, that the defendant was not prejudiced thereby. If the remarks were heard by any of the persons who served upon the jury, their tendency would rather be to create the impression that the state of the law was such that the death penalty could not be inflicted.

One Thomas French was a juror who served in the trial of the case. It is claimed that, in his examination as to his qualifications as a juror, he deceived the court and counsel by false answers to questions as to his knowledge of the defendant and of the alleged crime. This was one of the grounds of the motion for a new trial, and certain affidavits were filed in behalf of the defendant, and the juror was called and examined under oath touching the matter.

We need not set out the affidavits, or the other evidence taken upon this branch of the case. It is sufficient to say that we think the court did not err in overruling the motion on this ground. We are not prepared to say that the juror did not fully explain all the charges against him, and exculpate himself from any wrong.

II. We come now to the principal question in the case. The defendant claimed upon the trial that he should be excused for the homicide, upon the ground of insanity. And here it is proper that we should give a statement of the facts attendant upon the alleged crime. The defendant at the time of the homicide had been married about twelve years, and had a wife and five children, then residing in Des Moines. He left his family at Altoona on the twenty-third of December, 1880, and remained away until the latter part of February, when he returned, and remained at home until some time in May, when he again left, and was not at home at all after that, except on two or three occasions, and then only for a

4. MURDER:
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epilepsy.

short time—at one time half a day, at other times but a few minutes. In April, 1881, the family removed from Altoona to Des Moines. On the twenty-fourth of June, 1881, the defendant went to the home of one Hockersmith, with a woman named Martin, whom he represented to be his wife, and who was far advanced in pregnancy. He obtained boarding with Hockersmith for himself and the woman, and they remained there three nights and three days, and occupied the same room and bed. After leaving there, he took the woman to the home of one Anderson, where she remained two weeks and a few days. Some two or three days after going there, the defendant called on the woman, and was forbidden further visits. The woman was sent away from this place by Mrs. Anderson. The defendant stated to one witness, to whom he applied for boarding for the woman, that she came from Monroe, that she had been in the city only a few days, and that he was acting as her friend.

About July 20, John Epps took the woman to the house of Mrs. Bunce, and left her there, saying he would pay for her board. John Epps was a man some fifty-two years of age. He kept a barber shop, and made some claim to be a physician, and was called Dr. Epps. So far as appears, he and the defendant had been on terms of friendship, and the defendant had been taking medicine which was prescribed by Epps. On Saturday, the twenty-third day of July, 1881, the defendant was armed with a revolver, and declared to several persons his intention to kill Epps, because he (Epps) was going to produce an abortion upon the woman named Martin; that her father on his death-bed made him promise to protect her, and he was going to do it. On Sunday morning, the twenty-fourth of July, the defendant went to the house of Mrs. Bunce, and he was refused admittance. He engaged in conversation with a person who was sitting at an open window in an adjoining house. In this conversation he inquired if Epps had been at Mrs. Bunce's that morning, and was advised that he had been. He declared his purpose

to shoot Epps, because he was going to perform an abortion upon the woman named Martin. While engaged in this conversation, Epps came down the street, and the defendant stepped out on the sidewalk and asked him where he was going. Epps replied that he was going to Mrs. Bunce's. The defendant told him he should not go there—that he would shoot him—that he should not perform the abortion—that he would take his life first. He drew his revolver, and Epps ran across the street, the defendant following him, and, as they ran, the defendant shot Epps twice. The last shot pierced his heart, and he fell and died in five minutes. After he fell, the defendant stood over him and snapped his pistol at his heart. After the shooting, the defendant ran and attempted to escape, but was captured several squares away, and put in jail. The foregoing facts attending the homicide are not in dispute. They are but a plain, unvarnished statement of the evidence in the case, to which there is nothing in conflict or contradiction. If the defendant was of sound mind, and legally responsible for his acts, he was guilty of murder in the first degree. There was the intent to kill, the deliberation and premeditation, and all the elements necessary to constitute that crime.

The evidence upon the question of insanity is voluminous. Some forty witnesses testified for the defendant upon this point. We cannot set out the evidence in detail in an opinion. There is one fact, however, upon which all of the evidence is in accord, and that is, that for some time before the homicide the defendant had been afflicted with epilepsy. It appears that his mother's sister was in her lifetime subject to the same disease, and the father of the defendant has two nephews who are insane. It is not quite certain when the defendant was first affected in this way. His father states that the first he heard of it was three or four years before the trial in the court below, which was in April, 1882. The wife of the defendant testified that the disease commenced in March, 1879, which was some three years before

the trial. Other witnesses fix the time somewhat further back; but it is safe to say that he was not troubled in this way more than four years prior to the trial in the court below. It does not appear that the convulsions occurred at regular intervals, and at times they were merely momentary, and at other times continued for some time. Before and after the principal attacks, the witnesses for the defendant all concur in stating that his language was incoherent, showing that his mind was affected, and he labored under mental delusions, and had a wild and unnatural expression of the eyes. And some of these witnesses stated that on the day before the homicide, and in the evening of that day, he manifested these peculiarities.

But it appears quite evident from the testimony of these witnesses that there were times when the defendant was sane and rational. Dr. Kennedy, who was county physician for part of the time that defendant was confined in the jail, and who attended him professionally, while expressing the opinion that at times defendant was insane, did not state it as his belief that he was insane at all times. In answer to a question put by a juror, this witness stated that a large part of the time he regarded him as responsible for any crime that he might commit, but that he did not know how soon that condition might change.

On the other hand, a number of witnesses who were acquainted with defendant, and also saw him on the day of the homicide and the day before, testify that they saw nothing peculiar in his acts, declarations, or conduct. And it does not appear that there were any unusual manifestations on his part when he was arrested and put in jail. And the evidence does not show that he had any attack of epilepsy within a short time before the day of the homicide. And it does not appear that he was thus afflicted for some two weeks after he was confined in jail.

It is not claimed that epilepsy is necessarily such evidence of insanity as to excuse the subject of it from criminal re-

sponsibility. Common observation teaches that there are persons afflicted with this disease who at intervals between the convulsions are perfectly sane and rational. In Vol. I, Sec. 472, of Wharton & Stille's Medical Jurisprudence, it is said: "It will be peculiarly necessary here to make a division between the several classes of epileptic diseases. The infirmity is well known to appear in very different degrees of intensity under different circumstances, and, as it arises from different physical causes, it may be considered as exerting different retroactive influences on the mind and the body. It may affect the intellectual faculties in a very subordinate degree, as the cases of Cæsar, Napoleon and Mohammed sufficiently prove. The doctrine, therefore, results, that in general epilepsy the usual presumption of responsibility applies to acts committed in the intervals between one attack and another."

We are asked to set aside the verdict and reverse the judgment of the district court in sustaining the verdict, upon the ground that the evidence shows that defendant was not criminally responsible for the homicide by reason of insanity. A full, fair and candid examination of the record leads us to the conclusion that we cannot do so. If it were not that the defendant is condemned to death, we do not believe we would be asked to do so. We think the evidence very clearly shows that at times the defendant was sane and responsible, and it was for the jury to determine whether or not he was in that condition of mind when he took the life of his victim; and upon that question we cannot say that the verdict is wrong.

III. Complaint is made of the instructions given by the court to the jury. It is said that they "are heavily draped in favor of the state, and that the charities of the law are not made so conspicuous as the defendant had a right to expect or demand."

6. ———: In-
structions to
jury: stare
decisis.

Objection is made to certain expressions and phrases in the instructions, which are said to be prejudicial.

Goff v. The Hawkeye Pump and Windmill Co. et al.

The instructions are in full accord with the opinion in *State v. Felter*, 25 Iowa, 67, which assumes to direct the method of instructing a jury in cases of this character. The law as there announced has been too long followed and acquiesced in to be now questioned.

AFFIRMED.

GOFF V. THE HAWKEYE PUMP AND WINDMILL CO. ET AL.

- | | |
|-----|-----|
| 62 | 691 |
| 111 | 675 |
| 62 | 691 |
| 132 | 406 |
1. **Corporations: FALSE CERTIFICATES OF PAID UP STOCK: LIABILITY OF CORPORATION.** Where a corporation, contrary to statute, but by the mutual agreement of its stockholders, issues certificates of paid up stock when only a *pro rata* portion has in fact been paid, this may be ground for a proceeding in the interest of the public to wind up the concern, but it is not ground for one of the subscribers to the stock, and a party to the unlawful undertaking, to have his contract of subscription set aside, and his *pro rata* payment refunded.
 2. —: **SUBSCRIPTION TO STOCK: FALSE PROMISES: CANCELLATION OF SUBSCRIPTION.** A subscriber to the capital stock of a corporation cannot have his contract of subscription set aside, and the amount paid thereon refunded, simply because the corporation, by its agents, represented that it would put a certain amount of working capital into the concern, and then failed to do so, when the subscriber well knew the condition of the corporation, and its lack of funds, and no specific method for raising the funds was agreed upon.
 3. **Appeal to Supreme Court: CERTIFYING RECORD: JURISDICTION.** The trial court does not, because an appeal has been taken, lose its jurisdiction to do anything necessary for the presentation of the case in this court.

Appeal from Pottawattamie Circuit Court.

THURSDAY, JANUARY 31.

ACTION in equity to set aside a contract of subscription to the capital stock of the defendant, The Hawkeye Pump and Windmill Co. There was a decree for the plaintiff. The defendant appeals.

M. P. Brewer, for appellants.

Sapp & Lyman, for appellee.

ADAMS, J.—The plaintiff sets up two grounds for setting aside the contract fraud and failure of consideration. The fraud is alleged to consist in certain promises as to what the company would do, which promises it has not fulfilled. The failure of consideration is alleged to consist in the failure to fulfill the promises. The court found that the consideration of the subscription had failed, and decreed that the contract be canceled, and that the property which the plaintiff gave in payment for the stock be restored to him.

The company, as its name indicates, is a corporation organized for the manufacture of pumps and windmills. It is the owner of a patent right. The plaintiff is a mechanic. As such he entered into a contract with the company to manufacture for it one hundred pumps and windmills. While performing his contract with the company, he became desirous of acquiring an interest in the company; and the company having the power to issue more stock than had been subscribed, the plaintiff was allowed to take twenty-four shares, of the nominal value of \$2,400. He gave therefor property of the estimated value of \$1,200, and the stock was issued to him as full-paid stock.

The contract for the manufacture of one hundred pumps and windmills was by mutual consent abandoned, and the company itself entered upon the manufacture, employing the plaintiff as master mechanic in the business, at a salary of \$1,000 a year. The company, in proceeding with the business, incurred some indebtedness, though we think not a very large one. But, whether it was large or small, the company became somewhat embarrassed. It had never had much money, the stock which had been subscribed having been paid for in property. In view of the company's embarrassment and want of success, the plaintiff became desirous of rescind-

Goff v. The Hawkeye Pump and Windmill Co. et al.

ing his contract of subscription, of restoring his stock to the company, and recovering the property which he had given in payment for it. For that purpose he brought this action, averring that, at the time of his contract of subscription, one Evans and one Walker, stockholders, "acting for and on behalf of the company, represented and promised the plaintiff that the said company would * * * * put into said company the sum of \$10,000 as working capital." He also avers that the company has failed to put in said sum. Its alleged promise and failure in this respect constitute the fraud and the failure of consideration complained of.

The record discloses some very objectionable conduct on the part of the original stockholders, but we cannot for this reason depart from the proper rules of law respecting the rights and liabilities of stockholders in incorporated companies.

However objectionable may have been the conduct of the original stockholders, and however worthy of condemnation, we are not able to see how it gives the plaintiff any rights as against the company.

Many considerations have been urged in this case which cannot properly be deemed to have any legal bearing upon it. Evidence was introduced upon both sides in regard to the value of the patent right. This evidence is conflicting. One witness testified that it is worthless, and two that it is valuable. But we do not deem the question a material one. It does not seem to be involved in the issues as made by the pleadings, and, besides, if the pleadings presented the question, we could not hold that it is material, unless the law is that whoever subscribes for stock in an incorporated company, which holds among its assets a patent right, may be released from his subscription and placed *in statu quo*, if the patent right proves upon trial to be worthless; and no one would claim that that is the law.

Another thing urged upon our attention is the company's lack of money. At the time the plaintiff subscribed for his stock, the company does not appear to have had much money,

and does not appear to have had occasion up to that time to employ much money. It had not itself been engaged in manufacturing. After it entered upon the business of manufacturing, its needs seem to have become greater. But all this question and discussion as to the amount of money which the company had at the time the plaintiff subscribed for his stock seem to us to be wholly immaterial. No such question is presented in the pleadings, and, besides, there was no concealment in regard to the assets of the company, and there is no pretense that the plaintiff did not know precisely what they were.

Another thing urged upon our attention is, that no part of the stock subscribed for by any one was fully paid up, and yet it was issued as fully paid. There seems to have been a mutual understanding that, upon the payment of fifty cents on a dollar, and that, too, in property, stock should be issued as fully paid.

Under the statute, articles of incorporation must fix the amount of capital stock, and notice of the amount authorized must be given to the world. Code, § 1063. The public has a right to assume, where the stock of a company has all been issued as full-paid stock, that it has been paid for in full in money, or in property at a fair value. The mode of doing business adopted in this case has for its object to make a show of capital and responsibility not in fact possessed. But, while this might be ground for a proceeding in the interest of the public to wind up the company, it is not ground upon which the plaintiff can predicate his right to relief. He presents no such question in his petition, and, besides, he not only knew upon what basis stock had been subscribed and paid for, but he subscribed and paid for his stock upon the same basis.

We have said this much in regard to the questions discussed by counsel, which appear to us to be foreign to the issues and immaterial in every respect. We return now to what the plaintiff has actually averred in his petition as a ground of relief; and that is, that two of the stockholders, "acting for and

1. CORPORATIONS: false certificates of paid up stock: liability of corporation.

2. ———: subscription to stock: false promises: cancellation of subscription.

on behalf of said company, represented and promised the plaintiff that the said company would * * * * put into said company the sum of \$10,000 as working capital." This allegation the company denied.

The plaintiff introduced evidence showing that the company appointed stockholders Evans and Hendric as a committee to negotiate with him. The stockholders alleged to have made the promise in behalf of the company were Evans and Walker. Two witnesses testify to the alleged promise, and three deny it.

We think that there was some talk, at least on the part of certain stockholders, of procuring additional subscriptions to stock, and raising more money in that way. There is a little evidence tending to show that the original stockholders at one time contemplated advancing some money to the company for its use.

The plaintiff seems to have no theory whatever as to how the company was to obtain \$10,000. Sometimes we might infer from the argument of his counsel that his theory is that the company already had the money, and that the only question was as to using it as working capital. At other times they deny that the company ever had any money.

If the company already had the money, then the question pertained merely to the mode of conducting the business. If it had not the money, it could obtain it only by giving an equivalent in some form. The failure to obtain it, then, was not in our opinion a fraud, nor a failure of consideration of the plaintiff's contract of subscription to stock. If the company had borrowed \$10,000, the plaintiff's stock might have been worth more, and might have been worth less. If they were proceeding with a worthless patent, as the plaintiff claims, his stock would doubtless, by the incurment of such indebtedness, have been worth less. Not only would the company have been obliged to repay it, but the plaintiff himself, as his stock was in fact only half paid, might perhaps have been called upon for the balance. If the company

and the enterprise are in the condition in which he claims they are, we think that he ought to be thankful that the company, by doing so little, has involved itself so little. We think the decree of the circuit court cannot be sustained.

II. The appellee claims that the record was not certified until after the appeal, though within six months, and that the court below had no jurisdiction to certify the record after appeal was taken. But we think that the court below does not, by reason of an appeal being taken, lose its jurisdiction to do anything necessary for the presentation of the case in this court.

REVERSED.

SUPPLEMENT.

[The opinions reported in this SUPPLEMENT were held back upon petitions for re-hearing, and did not come into my hands in time for insertion in their chronological order.—REPORTER.]

JOHNSTON HARVESTER Co. v. CIBULA.

1. **Fraudulent Conveyance: FROM MOTHER TO SONS: EVIDENCE ESTABLISHING.** The evidence in this case considered, and *held* to justify the trial court in decreeing that a conveyance of land by a mother to her sons should be set aside as being in fraud of her creditors.

Appeal from Tama District Court.

FRIDAY, OCTOBER 5, 1882.

THIS is a creditors' bill alleging, in substance, that Martin and Mary Cibula were husband and wife, and that, being largely indebted, they conveyed certain real estate described in the petition to their two sons, Frank and John, who are made defendants, for the purpose of hindering and defrauding the creditors of the said Martin and his wife. The court found for the plaintiff, and defendants appeal.

Lamb & Bros. and *Wright, Cummins & Wright*, for appellants.

J. J. Mosnat and *W. H. Stivers*, for appellee.

SEEVERS, CH. J.—Possibly, as is claimed, owing to the fact that the defendants and the material witnesses introduced by the parties understand the English language indifferently, the case is, so far as the evidence is concerned, obscurely presented. It is exceedingly difficult to ascertain with certainty the facts established thereby. It seems to be undisputed that the defendant, Mary Cibula, was the owner of one hundred and sixty acres of land, which she conveyed to her two sons, in consideration of their paying her \$400, and assuming to pay a mortgage on the real estate conveyed for \$1,200. There is evidence tending to show that the \$400

was paid by the sale of grain raised on the land. It does not clearly appear to whom the land belonged when the grain was produced, but we are induced to think the land at that time belonged to Mrs. Cibula; but the defendants, or one of them, may have leased it of her. It is conceded that, at the time the conveyance was made, Mrs. Cibula was indebted to the plaintiff and at least one other person. The amount was not large. Possibly it did not exceed \$150. There is no positive and direct evidence that the boys, Frank and John, had any knowledge of such indebtedness. In fact, they testify that they had no such knowledge, and there is no evidence to the contrary, except inferences that may be drawn from the relation of the parties. The amount Frank and John bound themselves to pay for the premises was \$1,600. There are but two witnesses that testify as to the value of the same, one of whom is the defendant, John, who states, when asked what the land was worth, "I don't know." When asked, "How much do you think?" he replied, "I think about \$5 an acre." This evidence is very unsatisfactory, and the thought that the land is worth more than the answer stated is not negatived. If the land was worth only the amount stated, then Frank and John Cibula bound themselves to pay twice as much as it was worth. The other witness states that the land was fully worth \$20 per acre at the time the conveyance was made. This witness we judge to be entirely disinterested, and we think the land is worth the amount he states; such amount being twice as much as the defendants bound themselves to pay.

It does not clearly appear, but we suppose the mortgage was a prior lien. All that the defendants, Frank and John, therefore, have invested in the premises is \$400, and we feel constrained to hold the conveyance to them to be fraudulent and void as to the excess in value of the premises above the mortgage and the amount paid by them. The premises are amply sufficient to pay the plaintiffs and the mortgage, and to reimburse the defendants, Frank and John. The evi-

Wormer & Son v. The Waterloo Agricultural Works et al.

dence of the defendants is so unsatisfactory that the transaction cannot, we think, be upheld. It is possible that this is the misfortune of the defendants, and caused by their inability to explain themselves fully in our language. But we are impressed with the belief that it sufficiently appears from the evidence of the defendants that the transaction is not an honest one, but made with intent to hinder and delay creditors. In the petition, the plaintiffs seek to subject the land to the payment of a judgment in favor of one Odwarker against the defendant, Martin. We find no evidence in the abstract that there is such a judgment in existence. We take it for granted that it was not embraced in the decree below. If it was, there must be a modification in this respect. Until we are advised by counsel that such modification is required, we will simply affirm the judgment below.

AFFIRMED.

**WORMER & SON V. THE WATERLOO AGRICULTURAL WORKS
ET AL.**

1. **Subrogation: WHO ENTITLED TO: RULE STATED AND APPLIED.** A person may be subrogated to the rights of a creditor, in the absence of any contract or understanding, when he is surety, and pays the debt for his own protection, or when he is a junior lien-holder, and pays the senior lien for his own protection. But where a person is in no manner bound, and on his own motion, in the absence of a contract or expectation that he will be substituted in the place of the creditor, pays the debt, he will be regarded as an intermeddler, and not entitled to subrogation. (See authorities cited by Seevers, J.) Accordingly *held*, under the facts of this case, (see opinion,) where intervenor furnished the money to redeem from a judicial sale, that he was not entitled to be subrogated to the rights of the purchaser at the sale.

62	699
86	433
62	699
111	205
62	699
112	557
62	699
124	591
62	699
128	6

Appeal from Black Hawk District Court.

FRIDAY, DECEMBER 14, 1882.

ACTION to foreclose a mortgage executed by the defendant

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corporation. Robert Waller intervened, and seeks to have established a lien prior to that of the mortgage. The court found and entered judgment for the intervenor, and the plaintiff alone appeals.

Boies & Couch, for appellant.

Graham & Cady, for intervenor.

SEEVERS, CH. J.—As against the defendant, it was held in 50 Iowa, 262, that the plaintiff was entitled to a foreclosure of the mortgage. Two days prior to the *procedendo* being filed in the district court, Robert Waller intervened in the action by filing a petition, in which he claimed that the plaintiffs' mortgage was junior to certain liens or interests he had in and to the mortgaged premises. The material facts upon which such claim is based are as follows: The premises had been sold under executions issued on judgments establishing mechanics' liens thereon. These liens were prior to that of the mortgage, and one Bayless was the purchaser at the execution sale. The defendant's right of redemption expired in June, 1875. The right of creditors, including the plaintiffs, to redeem had expired prior to that time. Unless, therefore, redemption was made by or in the interest of the defendant, the premises would be conveyed by the sheriff to Bayless, and the interest of the plaintiffs under the mortgage, as well as that of defendant, would be cut off, and Bayless would become the absolute owner of the premises.

A day or two prior to that on which the right to redeem expired, one Ackley, president of the defendant, and acting for it, applied to one Cain, an agent of the defendant at Dubuque, for a loan to redeem the property from the sale to Bayless. Ackley represented, or caused Cain to understand, that Bayless would assign the certificate of purchase upon being paid the amount required to redeem. But it was regarded as doubtful, for want of time, if this could be accomplished, as Bayless was a non-resident. Redemption had to be made

in Black Hawk county, and the conclusion at Dubuque was that Cain should go to Waterloo prepared to and to make redemption, if he saw proper. Ackley and Cain reached Waterloo about 7 o'clock in the evening, and redemption, if made at all, had to be made before midnight. Ackley made efforts to see the attorneys acting for Bayless, but failed to do so, and it was then certainly developed that the certificate of purchase would not be assigned to the intervenor, if he advanced the money required to redeem. Cain, therefore, determined to make statutory redemption in the name of the defendant, and did so upon Ackley's promise to give what security he could, and it was agreed that he should execute to the intervenor a mortgage on the same premises upon which plaintiffs' mortgage was a lien, and assign certain judgments which he held against the defendant. On cross-examination, the following questions were asked Cain: "Well, did you in effect or in substance agree with him, (Ackley,) before you made a deposit of the money, that you would advance the money and take a mortgage upon the property of the Agricultural Works, provided you failed to get an assignment of the certificate of the sale from Bayless?" He replied: "Well, that was about the understanding." He was further asked: "And that was before you made the deposit, was it?" He replied: "Yes, sir." The mortgage under which the plaintiff claims was executed in 1873, and duly filed for record and recorded. Besides this, Cain had express notice of the mortgage, but Ackley informed him that in his opinion it could not be enforced, except it was possible it could be to the extent of one of the notes secured thereby, and, as we understand, the plaintiffs are now seeking to foreclose for said note. Ackley, during the negotiation as to the security to be given the intervenor, said to Cain that, if the collection of the note was enforced by a foreclosure of the mortgage, it would lessen the intervenor's security "to that extent, but that the works would be ample security."

When Ackley came to execute the mortgage, it was as-

Wormer & Son v. The Waterloo Agricultural Works et al.

certained that he did not have the authority to execute it, but that the power to sell the premises had been conferred upon him as president of the corporation. Whereupon he executed for and in behalf of the defendant a conveyance of the mortgaged premises to the intervenor. This conveyance is absolute on its face, and contains the following provision: that it was made "subject to any and all legal claims against said premises."

The intervenor insists that he in equity should be subrogated to the rights of Bayless. That, as the lien of the latter was prior to the mortgage, he should be adjudged to be the owner thereof, and that it retain its priority in his hands to the extent of the money advanced to redeem. He contends that "subrogation does not depend upon contract, but rests upon the principles of justice and equity." Many authorities have been cited by counsel in support of their respective theories. In the view we take of the case, we do not feel called upon to determine with any degree of exactness the rule as to subrogation. But, from a somewhat careful examination of the authorities cited, we incline to think a person may be subrogated to the rights of another in the absence of any contract or understanding, where he is a surety, and pays the debt for his own protection, or where he is a junior lien holder, and pays the senior lien for his protection. In such cases he cannot be regarded as an intermeddler, because as a surety he is bound for the debt, and as a junior lien holder he has an interest in preserving and protecting the common property. But where a person is in no manner bound, and on his own motion, in the absence of a contract, or expectation that he will be substituted in the place of the creditor, pays the debt, he will be regarded as an intermeddler, and not entitled to subrogation. *Shinn v. Budd*, 14 N. J. Eq., 234; *Uoe v. Railway Co.*, 31 Id., 105 (136); *Building Association v. Thompson*, 32, Id., 133; *Ketchell v. Mudgett*, 37 Mich., 81; *Gilbert v. Gilbert*, 39 Iowa, 657; *Barber v. Lyon*, 15 Id., 37.

The difficulty which lies in the intervenor's path is that he got all he contracted for or expected to get when he advanced the money and redeemed from Bayless. It is true that, in the first instance, the intervenor expected Bayless would assign the certificates of purchase upon being paid the amount required to redeem. But, when he advanced the money and made redemption, he knew the certificate of purchase could not be obtained, and he then contracted for a mortgage and certain other securities. The money, therefore, was not advanced under the belief or expectation that by so doing the intervenor would obtain all or any of the rights of Bayless. When the intervenor advanced the money under the belief that a mortgage would be executed to secure him, he was under no legal obligation to make the redemption. He did not see proper to advance the money and take his chances that he could, by so doing, be subrogated in the place and obtain the rights of Bayless, but stipulated what security he should receive. However broad the equities may be in favor of the intervenor, we cannot make a new contract for him, nor establish equities in his favor, when he did not rely thereon, and in effect made a contract for the security he should receive if he made the advancement. The stipulation in the deed strongly tends to show that Cain made the advancement with the expectation of paying the mortgage, or at least so much of it as could be enforced. He knew of the mortgage, and took the conveyance subject thereto. It seems to us that it would be inequitable now to say that the intervenor has a lien or right superior to the mortgage.

At the time the premises were conveyed to the intervenor, there were taxes due thereon, and we believe he has paid subsequent taxes, and also those then due. There had been established, also, a mechanics' lien in favor of Moore & Company on the real estate, or a building thereon—there is some dispute as to which. This lien has become the property of the intervenor, and was superior to the mortgage on the real estate, or a building thereon. The district court determined

Paton et al. v. Baker.

that for the taxes and the Moore & Company lien the intervenor was entitled to priority over the mortgage. We think this is correct, and do not deem it necessary to extend this opinion by stating our reasons; and this portion of the decree below is affirmed. But so much of the decree as gives the intervenor a lien prior to the mortgage for the money advanced to redeem the premises from Bayless is

REVERSED.

PATON ET AL. V. BAKER.

1. **Partnership: CONVEYANCE OF LAND TO PARTNER FOR FIRM DEBT: POWER OF PARTNER TO DISPOSE OF SAME.** Where land was conveyed to a partner in payment of a debt due the firm, and the word "trustee" was written in the deed after the partner's name, the object and understanding being that the deed should be so made, instead of to the firm, for greater convenience in again conveying the land when it should be sold. *held* that the partner had the right and power to bind his fellow partners by the sale of the land, through an attorney in fact appointed by him for that purpose, and that the word "trustee" in the deed neither enlarged nor restricted his power—the property being regarded as personal assets of the firm, as to which one partner may bind all the others by any contract made within the scope of the partnership.

Appeal from Appanoose Circuit Court.

THURSDAY, APRIL 19, 1883.

THE plaintiffs claim to be the equitable owners of certain real estate, and by their petition they seek to set aside and cancel certain conveyances thereof to the defendant. The defendant claims to be the legal and equitable owner of the land. There was a decree for the defendant, and plaintiffs appeal.

Stiles & Beaman, for appellants.

Tannehill & Fee and *Vermillion*, *Haynes & Vermillion*, for appellee.

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ROTHROCK, J.—In the year 1871, Thomas C. Paton, William Paton, J. Langmire, A. G. Agnew and W. A. Paton, the plaintiffs herein, were engaged in the dry goods business in the city of New York, in the partnership name of Paton & Co. Walter J. Crook, of Baltimore, was indebted to said partnership in the sum of about \$12,000. Crook failed in business and became insolvent, and, to pay the debt he owed said partnership, he conveyed the land in controversy, and other lands, to A. G. Agnew, one of said partnership firm. So far as the record before us shows, the deed was an ordinary conveyance, excepting that the word trustee was inserted therein immediately after the name of the grantee. There was no reservation of any right in the land by Crook, and the deed conveyed to Agnew the full title of the property. The conveyance was taken to Agnew, instead of to all the members of the firm, for convenience in conveying and selling the land, and it was understood that the lands were to be put in the market for sale. In 1874, the land being still unsold, Agnew executed to one LaForce, of Ottumwa, Iowa, a power of attorney, authorizing him to sell and convey the same. In the same year LaForce sold and conveyed the land in controversy to the defendant. The sale was consummated by the making of two deeds—one for thirty acres, in which the consideration expressed was \$450. This was a deed containing covenants of general warranty. The other was a quit-claim deed to eighty acres, which included the thirty acres, for an expressed consideration of \$100. The defendant paid the purchase-money in full, and part of it was remitted by LaForce to the plaintiffs' agent in Philadelphia, and was afterwards paid by him to the plaintiffs. LaForce sold the other land, and made default in payment to the plaintiffs, and absconded.

The plaintiffs insist that the conveyances to the defendant should be canceled, because Agnew held the land in trust for the other plaintiffs, and had no power to sell the same without their consent, and had no power to authorize LaForce to

Paton et al. v. Baker.

sell and convey, and that the defendant was charged by the record of the trust deed with notice of the rights of the plaintiffs other than Agnew, and is not an innocent purchaser. It is further claimed that the land was worth 1,200, and that the consideration paid therefor was grossly inadequate. Evidence was taken upon the question as to whether the individual members of Paton & Co. had notice of or consented to the sale of the lands in the manner in which they were sold, and the court by its decree required the defendant to pay to one of the plaintiffs the sum of \$74, and to another \$57, and made these amounts liens upon the land. This must have been on the theory that Agnew had no power to sell and convey without the knowledge and consent of his co-partners, and that the two to whom the allowance was made had no knowledge of and did not consent to the sales. The defendant does not appeal, and is content with the decree as it is.

In the view we take of the case, we do not deem it material to determine whether the plaintiffs consented to the sale or had knowledge thereof. Indeed, we think the decree of the court confirming the defendant's title may be sustained by conceding all of the facts claimed by the plaintiffs.

As we have seen, the partnership of Paton & Co. took the title of this land in payment of a debt due to the firm, and with the purpose of disposing of it as soon as a purchaser could be found. The firm continued in active business until after the land was purchased by the defendant. The partnership received part of the consideration for the land. We do not regard it as material whether or not they knew that the money received was part of the purchase-money.

It is well settled that, when land is purchased with partnership funds, and intended to be used for partnership purposes, it is to be treated as personal assets of the partnership. "Real property held by a partnership is to be regarded as the property of the firm as to the creditors and all persons dealing with it." *Hewitt v. Rankin*, 41 Iowa, 35, and authorities cited. Another rule equally well settled is, that one partner

may bind his co-partners by any contract made within the scope of the partnership business. Story on Partnership, § 322. And one partner is presumed to consent to all the acts of his co-partners within the scope of the business of the firm. *Boardman & Gray v. Adams & Hackley*, 5 Iowa, 224.

Now, if the word "trustee" had not been used in the deed to Agnew, of course the conveyance to the defendant would have been valid, because there is nothing in the record to show that the defendant had actual notice that the plaintiffs other than Agnew had any equity in the land. But appellants contend that defendant was charged by the record of the deed and power of attorney with notice that Agnew was a mere trustee, and without any power to sell. But we have seen that the land was held for sale, and, if the defendant had made inquiry as to the nature of the trust, it is to be presumed that he would have learned the truth, which was that the land was partnership assets, and, as to creditors and others dealing with the firm, it was the same as personal property of the firm. Every partner who holds the legal title of partnership real estate holds the same in trust for the benefit of the firm, and the trust created by this deed is not enlarged or limited by the use of the word trustee in the deed. If, then, the land is to be treated as personal property held by the firm for sale, any member of the firm could have made a contract of sale for the benefit of the firm, which would have been binding upon all the other members, and upon which a specific performance could have been enforced, because it would have been a contract within the scope of the partnership business. Suppose a partnership should take a horse, or any other personal chattel, in payment of a partnership debt, with the purpose of selling the property as soon as a purchaser could be found. No one would claim that a purchaser of such property, having notice that it belonged to the partnership, would be required to make his contract of purchase personally with all the members of the firm. The control and disposition of partnership real estate is not different, only that the partner

 Seymour v. Shea et al.

in whom the legal title is vested must convey to a purchaser to make his title complete. And, if one member can make a valid sale, surely the one who holds the legal title may authorize another to make the sale and conveyance. It will be remembered that Agnew did not make the power of attorney and did not effectuate the conveyance for any purpose outside the scope of the partnership, as for the purpose of paying his individual debt, or the like. We think these views are based upon principles which cannot be successfully assailed. The commercial and financial business of this country is largely transacted by partnerships, and their business requires that it should be transacted with as little circumlocution as is consistent with the rights of the individual partners and with the public. They ought not to be allowed to take advantage of an improvident contract made by one of their members, when the contract is within the scope of the partnership business. It is claimed that the purchase-price of the land was grossly inadequate. It is sufficient to say that it is not shown that the defendant practiced any fraud in making his purchase. It seems that he acted in entire good faith, and it does not appear that Agnew or his attorney was mentally incompetent to contract. We think the decree of the circuit court must be

AFFIRMED.

SEYMOUR V. SHEA ET AL.

1. **Practice in Supreme Court on Trial de novo:** WHAT QUESTIONS TRIED. Where a case is triable *de novo* in this court, all questions may be presented which legitimately arise upon the record, whether urged in the court below or not.
2. **Pleading and Practice:** ACTION TO SET ASIDE CONVEYANCE: CONSIDERATION: PAYMENT OF AND OFFER TO RETURN. When an action is brought to set aside a conveyance of real property, the petition is open to demurrer, unless it contains an offer to repay any consideration alleged to have been received by the plaintiff. If the petition is silent

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100 594

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Seymour v. Shea et al.

as to the receipt of consideration, it is vulnerable to a motion for a more specific statement, or the defendant may, as a defense, in his answer set up the payment on his part, and the failure of plaintiff to plead an offer to repay the same; but if he fails in one of these methods to raise the defense that plaintiff has not offered to repay the consideration received, he will be deemed to have waived the same, and he cannot afterwards urge it upon the trial. Code, § 2650.

3. **Taxes: RECOVERY OF BY GRANTEE OF PAYOR.** Where S., who had obtained by fraud the title to land, paid certain taxes thereon, and afterward conveyed it to H., in an action in equity against S. and H. by S.'s grantor to set aside the conveyance, *held* that upon a decree for plaintiff, after S. had ceased to be a party to the suit, H. was not entitled to judgment against plaintiff for the taxes paid by S.
4. **Fraud in Procuring Conveyance: FACTS CONSTITUTING: CONVEYANCE SET ASIDE.** Where an agent, by collusion with a third person, in the name of such person writes to his principal, falsely representing that there is a defect in his title to land, and the principal advises with the agent about it, and, acting on his advice, conveys the land for less than its value to such third person, and he conveys it to the agent, and the agent to another, the title may be set aside for fraud, and all the conveyances canceled, subject to such equitable rights as may appear in the agent's grantee.

Appeal from Palo Alto District Court.

THURSDAY, JUNE 14, 1883.

ACTION IN EQUITY. It is stated in the petition that plaintiff, in 1876, was the owner of certain described lands. That his title was derived from Palo Alto county under the swamp land grant, and that his title was perfect, except that the lands had not been patented by the state of Iowa to said county. That at said time the defendant, Shea, was the agent of plaintiff, and had the care and charge of said lands, and, for the purpose of cheating the plaintiff, wrote him a letter and signed the name of J. C. Bennett thereto, in which a desire to purchase said land was expressed, and representing that plaintiff's title was not good, but that he would like to control the land for the purpose of cutting grass thereon, and offered to give \$20 for a quit claim deed. Upon the receipt of said letter, the plaintiff wrote Shea, and

Seymour v. Shea et al.

asked his advice as to whether the plaintiff should accept the offer, and that Shea advised the plaintiff to do so, although at that time the land had been certified to the state for Palo Alto county, as Shea well knew, but of which fact the plaintiff was ignorant. That, acting on the advice given, the plaintiff conveyed the premises by quit claim deed to Bennett, but said deed was never delivered to him, and he by quit claim deed conveyed the land to Shea and his partner, Brown.

It is stated that, at the time the plaintiff conveyed the premises to Bennett, the land was worth \$200. The relief asked is that Shea be decreed to hold the title as trustee for the plaintiff, and that he be decreed to convey it to the plaintiff.

The defendants denied the allegation in the petition, and claim to be the owners of the land.

It was stated in the answer that defendants purchased the land in 1877, and had paid the taxes thereon, amounting to \$21.94. The defendants asked that the petition be dismissed, and that the title of the land be quieted in defendants.

Trial to the court, and a decree entered canceling all conveyances of the land, including and subsequent to the one made to Bennett, and vesting the plaintiff with the legal title; saving, however, to the defendant, Harrison, a right of action for the purchase money and for the taxes paid. The defendants appeal, and the cause is triable anew in this court.

T. W. Harrison, for appellants.

Soper & Crawford, for appellee.

SEEVERS, J.—I. At the term the cause was submitted, it was made to appear to the court that Brown had conveyed to Shea, and the latter to one Gregg, and he to T. W. Harrison, and that the latter was the only real party in interest; where-

upon, on motion, the said Harrison was duly substituted as defendant in this cause instead of said W. H. Shea.

It is insisted by both parties that certain questions are made for the first time in this court, and therefore, under the settled practice, they cannot be considered. As to some of these questions we have the simple assertion of counsel in argument that the same were not made in the court below. The record fails to disclose whether these assertions are true or not. If we accept as true all that is said by counsel, the case was badly tried in the district court. As the case is triable here *de novo*, we understand that all questions may be presented in this court which legitimately arise on the record, whether the same were urged or relied on in argument in the district court or not.

We cannot rely on the assertions of counsel in this respect, but must look alone to the record, and, if a question now urged is made therein, or fairly arises because of allegations contained in the pleadings, then the conclusive presumption must be indulged that such question was before the court, although it may not have been specifically relied on in argument.

II. It will be conceded that the rule in equity is, when an action is brought to rescind a contract or set aside a conveyance of real property, that the petition is demurrable, unless there is contained therein an offer to repay the consideration received. It will also be conceded for the purpose of the case that, in the absence of a statute, the rule goes further, and that the relief will be denied in cases where no such offer is made.

We have no occasion to determine in this case whether it is essential that a tender or offer must be made prior to the commencement of the action, because no such question is presented in the pleadings, and, therefore, it cannot and does not arise in the record before us.

1. PRACTICE
in supreme
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de novo:
what ques-
tions tried.

2. PLEADING
and practice:
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eration: pay-
ment of and
offer to re-
turn.

It will be observed that it is stated in the petition that, in the Bennett letter, Shea offered to pay \$20 for the land, and that Shea advised the plaintiff to accept. That plaintiff accepted the offer and executed the conveyance, but it is not stated that Shea or any one else paid the \$20, or any other sum, or that plaintiff received anything for the conveyance.

The petition, therefore, was not demurrable. It was vulnerable only to a motion for a more specific statement. The petition does not contain an offer to repay the consideration, for the simple reason that it is not admitted that any was received.

It appears in evidence that Shea paid the plaintiff \$25 for the conveyance made to Bennett. Now, under the circumstances above stated, it is urged by the defendant that no relief can be granted the plaintiff, because he did not offer to pay the consideration received by him.

The statute provides: "When any of the matters enumerated as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer. If no such objection is taken, it shall be deemed waived. If the facts stated by the petition do not entitle the plaintiff to any relief whatever, advantage may be taken of it by motion in arrest of judgment before judgment is entered." Code, § 2650.

As it was not stated in the petition that a consideration had been paid for the conveyance to Bennett, this fact, if intended to be relied on as a bar to plaintiff's recovery, should have been pleaded in the answer.

As this was not done, such defense, under the statute, must be regarded as waived. This is the plain and express provision. There is no room for construction, and it is eminently just. A party in all fairness should in his pleadings state or set up the several claims or defenses he intends to rely on, and the adverse party or the court should not be called upon to meet or adjudicate questions not thus presented and relied on.

III. The defendant, Shea, pleaded as a defense that he had paid certain taxes on the land, that had accrued after the conveyance to Bennett. The evidence sustains this allegation. But there is no evidence tending to show that Harrison is the owner of the said claim, and, as Shea has ceased to be a party to the action, he is not entitled to any relief.

3. TAXES: recovery of by grantee of payor.

The evidence shows that Shea conveyed the land to Gregg, and the latter to Harrison, and that Shea paid the taxes. This is insufficient to authorize Harrison to recover the amount paid as taxes by Shea.

IV. In our judgment, it clearly appears that the conveyance was obtained by fraud. Shea was plaintiff's agent. He wrote a letter in Bennett's name to the plaintiff, stating that plaintiff's title was not good, and offering him \$20 for a quit-claim deed. Plaintiff, who was a non-resident, advised with Shea as to whether he should accept such offer, and Shea advised him to do so. Whereupon the plaintiff agreed to take \$25, which offer Shea, in the name of Bennett, accepted.

4. FRAUD in procuring conveyance: facts constituting conveyance set aside.

The preponderance of the evidence quite satisfactorily shows that the land was worth at least \$200 at the time it was conveyed to Bennett. We think the evidence sufficiently shows that Shea knew, at the time he made the offer to purchase, that plaintiff had at least a perfect and sufficient equitable title, which at no distant day would ripen into a perfect legal title. The fraud of Shea is too transparent, it seems to us, to require an argument to demonstrate.

AFFIRMED.

ANDREWS & SMITH V. BURDICK & GOBLE ET AL.

1. **Mechanics' Lien : OF SUB-CONTRACTOR: AVOIDANCE OF BY PAYMENT TO PRINCIPAL CONTRACTOR.** Where a sub-contractor furnishes to the principal contractor materials for a house, and duly files his claim for a mechanics' lien, and gives notice thereof to the owner within thirty days after the last of the materials are furnished, but, at the time of the service of the notice, the owner has paid the principal contractor in full, pursuant to the terms of his contract, the lien will be enforced, provided the owner had *actual* notice of the facts out of which grew the sub-contractor's claim. In the absence of any such notice, payment in good faith to the principal contractor, pursuant to the terms of the contract, will defeat the lien. See *Stewart v. Wright*, 52 Iowa, 335, and *Winter v. Hudson*, 54 Id., 336.
2. ———: ———: **PAYMENT TO CONTRACTOR WHERE WORK IS DEFERRED.** Where a contractor agrees to finish a house by a stated time, at which he is to receive his final payment, and the work is not then finished, but, with the consent of the owner, it is finished at a later day, the last payment is not due until the work is actually finished; and, in the absence of any other contract, compensation for extra work is not due till the work is finished; and it would *seem* that payment in such a case, before the actual completion of the work, would not be good as against a sub-contractor otherwise entitled to a lien.
3. ———: ———: **HOW AFFECTED BY ALTERATION OF PRINCIPAL CONTRACT.** Where a builder's contract is changed in a material point, without authority, after its execution, but a sub-contractor is not prejudiced in any way by such alteration, his right to a mechanics' lien will not be enlarged on account thereof
4. **Appeal to Supreme Court: CHANCERY CASES INVOLVING LESS THAN \$100: CONSTITUTIONALITY OF STATUTE.** Section 3173 of the Code, restricting appeals to the supreme court, and providing for the certification of questions of law in actions involving less than \$100, is not, when applied to chancery cases, repugnant to Sec. 4, Art. 5, of the Constitution, which defines the jurisdiction of the supreme court; and such cases are not triable *de novo* in this court, ADAMS, J., *dissenting*.
5. ———: **LESS THAN \$100: ACTION INVOLVING INTEREST IN REAL PROPERTY: WHAT IS NOT.** An action brought to enforce a mechanics' lien is not "a cause in which is involved any interest in real property," as contemplated by Sec. 3173 of the Code, limiting appeals to the supreme court to cases where more than \$100 are involved.
6. **Practice in Supreme Court: FAILURE TO ASSIGN ERRORS: OBJECTION WAIVED.** Where appellant fails to assign errors, the appellee, if he desires to take advantage of this failure, must do so at the proper

Andrews & Smith v. Burdick & Goble et al.

time, and when, as in this case, he does not raise the objection until after the argument of the cause upon its merits, he will be deemed to have waived his right to object.

Appeal from Palo Alto District Court.

FRIDAY, JUNE 15, 1883.

ACTION in chancery to enforce a mechanics' lien in favor of a sub-contractor. Judgment was entered against the contractors, but the petition was dismissed as to the owners of the property, the court holding that plaintiffs are not entitled to a lien. Plaintiffs appeal.

T. W. Harrison and Geo. B. McCarty, for appellants.

Soper & Crawford, for appellees.

BECK, J.—I. Plaintiffs furnished materials to Burdick & Goble, builders, who were erecting a storehouse for Potter & Skevington, under a contract with him. By the terms of the contract, payments were to be made in nearly equal parts upon the execution of the contract, and the completion of the building, and its acceptance by Potter & Skevington. It was to be completed between the 15th and 20th of June. It was not finished until the 3d of July. On the 5th day of June, plaintiffs furnished the materials to recover for which this suit is brought. On the morning of the 3d of July, plaintiffs filed in the clerk's office a statement and claim for a lien, and in the evening of that day caused the notice to be served upon Potter & Skevington required by the statute. There was evidence showing that they had knowledge of the fact that the sub-contractors had furnished the materials. But on the 3d day of July, after plaintiffs' claim for a lien was filed, and before the written notice prescribed by the statute was served, they paid the contractors in full the amount due them for the building. Extra work, amounting to \$75, was done, and paid for at the final settlement. Extra work was contemplated in the contract.

A motion for a new trial was made by plaintiffs, on the

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ground that there had been a material alteration of the contract for the building, which was unknown to the plaintiffs before the trial, purporting to bind the contractors to furnish all materials, no such provision being in the original writing. The motion was overruled. The amount in controversy being less than \$100, the district court certified certain questions of law to this court, whereof the following is a copy, *verbatim et literatim*. The points raised by the questions will be understood by attention to the facts of the case above stated.

"1st. Under a written contract for the completion of a building by the 15th to 20th of June, 1880, and the payment therefor to be made upon the completion of the building, which, in fact, was not completed until July 3d, 1880, would a sub-contractor, who furnished materials on the 5th day of June, 1880, and filed a mechanics' lien therefor in the clerk of courts' office on the 3d day of July, 1880, before payment was made by the owner to the contractor, and, after said lien was filed, and on the same day, but before written notice therefor was served by the sub-contractor upon the owner, but with verbal notice of the plaintiffs' lien, the owner paid the contractor in full, and afterwards, on the same day, written notice was served of the filing of said lien by the sub-contractor upon the owner, can the sub-contractor enforce that lien against the building?

"2d. Where a written contract provides that the building is to be completed by the 15th to the 20th of June, and that complete payment is then to be made, but the building is not, in fact, completed until thirteen days thereafter, and the owner acquiesces in such delay, is this such a change in the contract as will entitle a sub-contractor to 30 days after furnishing material in which to file his claim for a lien, and serve written notice thereof on the owner, and will the owner be liable to such sub-contractor, although the building may have been completed and the contractor paid in full therefor prior to the expiration of such 30 days?

3d. Where a contract for the building of a store-room pro-

vided that the contractor should furnish such extras as should be ordered by letter, and extras were, in fact, furnished by them, but it is not shown whether they were ordered by letter or otherwise, and when the contract provides for payment of the contract price upon the completion of the building, but is silent as to the date of payment for the extras that may be furnished, can a sub-contractor who furnished material and filed his claim for a lien, and gave written notice thereof within 30 days, establish a lien against the building for the materials furnished by him, or to the extent of the extras furnished by the contractors, if the building was finished and accepted by the owner within 30 days, and payment in full made therefor to the contractors within the 30 days?

"4th. Where there was a written contract for the erection of a building, would an unauthorized material alteration in the terms of said contract, after it was executed and delivered, entitle a sub-contractor, who furnished material for said building, to 30 days after the materials were furnished in which to file his lien and serve written notice thereof? Would such alteration of the written contract invalidate it, so that the sub-contractor would have thirty days after furnishing materials in which to file his lien and serve his notice, regardless of the terms of said written contract?

"5th. Where a written contract has been materially altered without authority, after execution and delivery, would the parties therein be permitted to show and rely upon the oral agreement upon which the written agreement was drawn, or will the parties be required to rely and recover, if at all, upon an implied compact to pay when the building was completed, and in such case would the sub-contractor have thirty days after furnishing material in which to file his lien and serve written notice thereof?"

II. The first question presents, briefly stated, the case of

1. MECHANICS' lien : of sub-contractor : avoidance of by payment to principal contractor.

payment by the owner of the building to the contractor before the expiration of thirty days after the materials were furnished by the sub-contractor, and before service of the written notice, required

Andrews & Smith v. Burdick & Goble et al.

by the statute, of the filing of the claim and statement for a lien by the sub-contractor, with knowledge that the sub-contractor had furnished the materials.

III. The statute secures to a sub-contractor a lien for materials or labor. Chap. 100, Acts Sixteenth General Assembly, § 7 (Miller's Code, § 2134; McClain's Statutes, p. 599) provides that, "to preserve his lien as against the owner, and to prevent payment by the latter to the principal contractors or to intermediate sub-contractors, but for no other purpose, the sub-contractor must, within the thirty days, as provided in section six, serve upon such owner, his agent or trustee, a written notice of the filing of said claim." The notice referred to, which is provided for by section six, must be given within thirty days after the date upon which the last of the materials was furnished.

It will be observed that the lien of the sub-contractor may exist for thirty days without the written notice. If such written notice be not given within that time, the lien ceases. The provision is explicit, and no exception is found in the statute which will discharge the lien within the thirty days. But this court, liberally construing the statute, so as to protect the owner who in good faith paid the contractor in accord with the agreement between them, held that such payment, made without knowledge on the part of the contractor of the claim of the sub-contractor, would defeat the lien of the latter. *Stewart & Hayden v. Wright*, 52 Iowa, 335. The decision is based upon the right of the parties to the contract to make payment as provided therein, and the doctrine that the sub-contractor must take notice of the contract between the owner and contractor, and that his rights are subordinate thereto. The want of knowledge by the owner of the claim of the sub-contractor is explicitly stated and recognized as a controlling element in the case.

In harmony with the foregoing case, *Winter & Co. v. Hudson*, 54 Iowa, 336, holds that payment by the owner, in accord with the terms of his contract with the contractor, with

knowledge of the claim of the sub-contractor, will not defeat the lien of the latter. These cases are in point, and, following them, we answer the first question certified by the court below by saying that, upon the facts which it presents, the sub-contractor is entitled to the lien which he seeks in this action to enforce.

The fact stated in the first question, that the building was not completed within the time prescribed in the contract, cannot change the result, when payment is made with knowledge by the owner of the sub-contractor's claim.

IV. The real point presented in the second and third questions, it seems to us, is this: Upon the facts stated, was 2. — : — the time of payment under the contract changed, so payment to contractor where work is deferred. that the payment made on the 3d day of July was before the money unpaid upon the building, and the price of the extras, was due?—the inquiry appearing to be, whether the time of completion and acceptance of the building, as fixed by the contract, was the time of payment for the building and extras. We think the delay in the work, with the acquiescence of the owner, delayed the time of payment until the work was done and accepted. And, as no time was fixed for payment for the extras, the price thereof became due when the building was completed and accepted.

But we fail to perceive the importance of the question in connection with the facts of the case. The claim and statement of the sub-contractors were filed, and written notice required by the statute was given, within thirty days after the materials were furnished. The payment was made after the filing, but before the written notice, and upon the completion and acceptance of the building, when, in any view, the money must have been due. It follows that, if the owners had no knowledge of the sub-contractors' claim, the payment defeats their lien. If they had such knowledge, the lien may be enforced.

V. The 4th and 5th questions do not present the case of an alteration of an instrument which would affect its validity.

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3. —: —: ^{how affected by alteration of principal contract.} A material, unauthorized alteration of an instrument, without more, will not in all cases wholly invalidate it. If the alteration be material and unauthorized, yet made by a stranger, without an evil purpose, through mistake, or the like, and it may be with certainty restored to its original condition, it will not be invalid as between the original parties, and, surely, will not be when the interest of a stranger is brought in question under it. We cannot, therefore, in reply to the question, say that the contract was affected by the alterations recited in the questions.

Upon referring to the facts of the case as disclosed by the abstract, which we are not required to do in answering the questions, it will be found that the alteration figuring in the case was the addition of words in pencil, and it is not shown by whom it was made. The evidence of one of the parties to the contract, who would be affected by the alteration, shows that it accords precisely with the contract the parties made, and that they performed the contract as it reads, with the alterations, and acknowledged that they considered themselves bound so to perform it. No objection on the ground of the alterations seems to have been raised by the parties to the contract at any time, or in any form. Surely, in a chancery case, where no prejudice results or can result to any one from an alteration of the character just described, which is brought in question by one not a party to the instrument, the alteration cannot be regarded as a thing affecting prejudicially the rights of parties or strangers to the instrument.

VI. The plaintiffs claim that the case is not to be decided upon the questions certified by the judge of the district court,

4. APPEAL to supreme court: chancery cases involving less than \$100: constitutionality of statute.

but must be tried *de novo*, insisting that the provisions of Code, § 3173, limiting appeals to cases where more than \$100 are involved, unless certified to this court, cannot be construed to apply to chancery cases, without giving it an effect which would be in conflict with section 4, article 5, of the constitution,

which bestows upon this court appellate jurisdiction in cases in chancery, and constitutes it a court for the correction of errors at law. The point made by counsel is that the statute, if applied to suits in chancery, would give this court jurisdiction to correct errors in chancery cases, as in actions at law.

It cannot be doubted that, under this constitutional provision, it is competent for the legislature to regulate appeals in chancery, and impose restrictions thereon in cases not involving an amount specified.

Such regulations and restrictions may be applied to law cases. There can be no reasons given why chancery suits may not be subject to the like provisions. Appeals, then, in chancery cases may be restricted as in Code, § 3173; that is, the legislature may provide that cases which involve amounts less than \$100 shall not be brought to this court for trial *de novo*. And there is no constitutional provision prohibiting the legislature to provide for the trial of chancery cases in this court upon questions of law certified by the court below. The statute under consideration is, therefore, not unconstitutional, when applied to chancery actions. Nor is it inconsistent with Code, § 2742, which provides generally for the trial *de novo* of chancery cases on appeal, being a limitation and restriction upon that section, excluding from its provisions cases involving less than \$100. In this view, both sections stand.

VII. The restrictions of Code, § 3173, do not extend to "any cause in which is involved any *interest in real property*." This action is to enforce a mechanics' lien.

5. — : less than \$100: interest in real property.

Is an interest in real estate involved therein? The right of plaintiff to the lien and to its enforcement is involved in the action. Is this right an "interest in real estate." It is not a *jus ad rem*, or a *jus in re*, a right to the property in question, but is a right to a remedy against the property, whereby the real estate is subjected, by the specific lien, to the payment of plaintiffs' claim. See 1

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Story's Eq., § 506; *Conard v. Atlantic Ins. Co.*, 1 Pet., 386 (443); *Meany v. Head*, 1 Mason, 319.

An interest in real estate is something more than a right to a remedy against it. The word interest, as used in the section of the Code just cited, means share, portion, part. See Webster's Dictionary. When applied to land, it means the estate, right or title held in or to it. See Bouvier's Dictionary; Coke on Lit., 245-6. A lien, special or general, is not, therefore, an interest in lands. An action to enforce it is not within the exception to the limitations upon appeals found in Code, § 3173.

VIII. The abstract before us fails to present an assignment of errors. All the questions involved in the case have been argued by counsel of the respective parties; defendants' counsel presenting a printed argument, in which they discuss all points made by the other side. But at its close they make the objection that no assignment of errors was made by plaintiffs. The statute provides that, when errors are not assigned within the time prescribed, "the appellee may have the appeal dismissed, or the judgment or order affirmed, unless good cause for the failure be shown by affidavit." Code, § 3183.

This statute does not contemplate that the case shall be tried in the ordinary way, upon the merits, and the want of an assignment of errors be finally urged as a ground of disposition of the case, thus unnecessarily consuming the time of the court and imposing costs upon the other party. Like all other objections, this one may be waived by the silence and acquiescence of the parties. It ought to be regarded as waived in this case.

We are not to be understood as holding that the court may not require an assignment of errors, notwithstanding the waiver of the parties. The court may upon its own motion enforce the rule requiring the assignment, though waived by the parties.

The question we do not decide, whether an assignment of

6. PRACTICE
in supreme
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errors is necessary in chancery cases wherein questions are certified under Code, § 3173.

We have considered all questions discussed by counsel, and reach the conclusion that the decree of the district court ought to be

REVERSED.

ADAMS, J., *dissenting*.—I think that, where an action in equity is tried below upon its merits, and is in such a condition that, upon appeal, a final decree could be entered in this court, the action is triable *de novo* in this court, if at all. Code, § 2742.

PLAYER V. THE BURLINGTON, CEDAR RAPIDS & NORTHERN
RAILWAY COMPANY.

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1. **Practice: CROSS-EXAMINATION: DISCRETION OF COURT.** The extent to which cross-examination may be allowed is peculiarly within the discretion of the court, and a cause will not be reversed for an error in this respect, unless it appears that the court has abused its discretion, and that the complaining party has been greatly prejudiced thereby.
2. **Railroads: PERSONAL INJURY: RIDING IN FREIGHT CAR: CONTRIBUTORY NEGLIGENCE.** Where one, having cattle on the train, has time to get aboard the "caboose," but fails to do so, and boards a freight car and rides therein, by reason of which fact he is injured, he is guilty of such contributory negligence as will defeat his recovery for such injury, notwithstanding the railway employes may have been negligent in not bringing the "caboose" within a reasonable distance of the depot.

Appeal from Black Hawk Circuit Court.

SATURDAY, JUNE 16, 1883.

THE plaintiff was in charge of, and shipped from Nora Junction, a station on defendant's road, a car load of cattle. After the cattle were placed in the car, the plaintiff went to the depot for the purpose of signing the shipping contract.

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While there, he was informed by the agent that he would have to make haste if he got to the caboose before the train started. It is stated in the petition that it was a dark night, and that the passage-way from the depot to the caboose was along a high embankment, of insufficient width to allow a person to walk thereon with safety; "that it was defendant's duty to furnish a safe and reasonable passage from its depot aforesaid to the caboose of said train, and reasonable time to go from said depot to such caboose after the execution of such contract, so that he might safely accompany said cattle on such journey."

The plaintiff claims that he started from the depot to go to the caboose, and, while going in that direction, he asked one of the brakemen on said train whether he would have time to reach the caboose before it started, and was told by the brakeman that he would not, and he was directed by the brakeman to get on one of the freight cars, which the plaintiff did, and, while riding thereon, the car was thrown from the track, and he was injured.

The defendant pleaded a general denial, and contributory negligence on the plaintiff's part. Trial by jury. Verdict for defendant, and judgment. Plaintiff appeals.

H. Boies and J. L. Husted, for appellant.

J. & S. K. Tracy and O. C. Miller, for appellee.

SEEVERS, J.—I. Counsel for the appellant, in their argument, base their right to recover on the following propositions:

"1st. That defendant failed to furnish plaintiff a safe and reasonable passage-way from its depot to the caboose in which he was to ride.

"2d. That defendant failed to give plaintiff reasonable time, after his contract for the shipment of said cattle was signed, to go from the depot to said caboose before the train was started, and its agents directed plaintiff to climb on one of the freight cars, by reason of which he was compelled to, and

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did, in order to accompany his stock, climb on such car, where he was injured.

"3d. That, by reason of some defect in the cars or road of defendant, the train was thrown from the track, and the plaintiff was injured."

The second count alleges that plaintiff, by direction of defendant's agents, being informed by them that he would not have time to reach the caboose, did climb upon one of the freight cars, where he was riding, when, by reason of some defect in the cars or road bed, the train was thrown from the track, and he was injured.

It may be conceded that the first proposition is true, but the plaintiff was not injured because of the unsafe condition of the passage-way from the depot to the caboose. It was proper for the jury to consider the condition of the way for the purpose of determining whether the defendant had sufficient time to go from the depot to the caboose before the train started, and in no other respect was it material whether the way was safe or unsafe.

As to the third proposition, it will be conceded that the negligence of the defendant is sufficiently shown, and that the plaintiff is entitled to recover, if he was not guilty of contributory negligence in riding on the freight car instead of the caboose; and this depends on the question whether he was properly on the freight car.

It clearly appears that if he had been in the caboose he would not have been injured.

As to the last proposition above stated, it is sufficient to say at the present time that the jury found specially that the brakeman had no authority to direct the plaintiff to get on the freight car.

This proposition will be further considered when we come to consider the instructions of the court which are objected to. The material question in the case is contained in the second proposition above stated.

II. The plaintiff testified that the brakeman did direct

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him to get on the freight car under the circumstances above stated. The brakeman testified that he did not do so, and on cross-examination the brakeman was asked the following question: "Is it customary for parties in charge of stock on trains to enquire of brakemen, when the conductor is not present, with reference to movements of trains." This question was objected to, because incompetent and immaterial. The objection was properly sustained, because, if answered either in the affirmative or negative, it could not have affected the result. Besides this, there is no evidence tending to show that the plaintiff had knowledge of the alleged custom and relied thereon.

The conductor was a witness introduced by the defendant. On cross-examination he was asked: "Do you know whether it is customary with stock men, who have stock on trains on this road, to examine their stock at each stopping place." The objection of the defendant, to this question that it was not proper cross-examination, was properly sustained. Plaintiff then offered to show by the conductor "that brakemen were in the habit at this time, and prior, upon this road, of giving information to men in charge of stock as to the movements of the trains, and that he knew it and assented to it." This was objected to as not proper cross-examination, and the objection was properly sustained.

The conduct of the trial, and the extent to which the cross-examination of witnesses may be allowed, is peculiarly within the discretion of the court, and a cause will not be reversed for an error in this respect, unless it appears that the court has abused its discretion, and the party has been greatly prejudiced. We are unable so to conclude in this case.

III. The plaintiff sought to prove that after the cattle were loaded he spent some time while a pin was being looked for to fasten the door of the car. But this occurred before the plaintiff went to the depot to sign the contract, and no complaint is made in the petition that defendant was negligent in

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not having a pin where it could be readily procured; nor is it stated in the petition that the delay above mentioned in any respect contributed to the injury.

IV. The court instructed the jury as follows:

“8. There is no evidence tending to show negligence on the part of the defendant, which resulted in the injuries complained of, other than the failure to give plaintiff reasonable time to reach and board the said caboose, and, unless negligence in that respect is established by a preponderance of credible testimony, the plaintiff cannot, in any event, recover; but, if you find that a failure to give such reasonable time is so established, then you will proceed to the determination of the question as to whether there was contributory negligence on plaintiff's part.”

“9. The safe and proper place for a passenger on a freight train is, under all ordinary circumstances, in the caboose; and, ordinarily, it is such negligence to be riding elsewhere, that a passenger cannot recover damages for injuries sustained when such passenger is so riding upon a car other than the caboose.”

It is said that the court took from or declined to submit to the jury the question whether it was defendant's duty to bring its caboose within a reasonable distance of its depot to enable him to enter it in safety. But this question was immaterial. The court submitted the question to the jury whether the plaintiff had sufficient time to get aboard the caboose. If he had, as the jury found specially, it was immaterial under the allegations of the petition where the caboose was standing. If the plaintiff had sufficient time to get aboard the caboose, he was not justified in getting on a freight car. In so doing he was guilty of contributory negligence. It is really immaterial what caused plaintiff to loiter on the way to the caboose, unless he did so because of something done by defendant or its employes, and of this there is not the slightest evidence. Both of the foregoing instructions, in our opinion, are clearly correct. The tenth and eleventh instructions are also objected to. We do not deem it necessary to set them out.

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They are in accord with the foregoing, and, therefore, in our opinion, correct.

AFFIRMED.

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|-----|-----|
| 69 | 728 |
| 78 | 654 |
| 82 | 728 |
| 83 | 372 |
| 85 | 728 |
| 86 | 373 |
| 93 | 728 |
| 93 | 136 |
| 127 | 146 |
| 127 | 151 |
| 134 | 728 |
| 134 | 752 |
1. **Railroads: PERSONAL INJURY TO EMPLOYEE: RECOVERY AGAINST RECEIVER: STATUTE CONSTRUED.** A receiver, who is operating a railroad under the appointment and direction of a court, is included under the terms, "persons owning or operating railways," in contemplation of §§ 1278, 1307 of the Code; and such receiver, or rather the property in his hands, is liable for the claim of an employe for injuries received through the negligence of co-employees.
 2. ———: ———: **RECOVERY AGAINST COMPANY TAKING FROM A RECEIVER THE ROAD BURDENED WITH THE LIABILITY.** Where a railroad was for a time operated by a receiver, under the appointment and direction of the United States circuit court, and during this time a claim for damages arose in plaintiff's favor and against the receiver on account of personal injuries, and the court ordered the railway to be turned over to the defendant, upon condition that it would assume and pay all liabilities incurred while the road was operated by the receiver, and the defendant accepted the property with the conditions attached, *held* that it thereby became liable to the plaintiff on account of his claim for damages, and that an action thereon was properly brought against defendant.
 3. **Verdict: EVIDENCE TO SUPPORT: PRACTICE IN SUPREME COURT.** This court will not overrule both the jury and the trial court upon findings based upon conflicting evidence.
 4. **Railroads: PERSONAL INJURY OF BRAKEMAN: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** Whether or not the plaintiff, a brakeman, was guilty of contributory negligence in not taking hold of the brake-rod, or something else, to steady himself, in anticipation of a "jerk," was a question for the determination of the jury from a consideration of all the circumstances.
 5. ———: **AUTHORITY OF CONDUCTOR TO EMPLOY BRAKEMEN: LIABILITY OF COMPANY.** When a regular brakeman is absent, and the safe and proper management of the train requires it, the conductor has authority to employ a brakeman for the time being, who thereby becomes an employe of the company, and is entitled to recover for injuries received through the negligence of a co-employe.

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6. ———: PERSONAL INJURY TO BRAKEMAN: SUNDRY RULINGS OF THE TRIAL COURT CONSIDERED AND APPROVED. The instructions given by the court, and the rulings upon the admission of evidence, and upon the submission of special interrogatories to the jury, and upon the special findings of the jury, being considered by the court, and found to be in harmony with the views already expressed in this case, are approved.

Appeal from Poweshiek Circuit Court.

SATURDAY, JUNE 16, 1883..

THE facts are sufficiently stated in the opinion.

H. E. J. Boardman, J. H. Blair and A. C. Daily, for appellant.

H. W. Gleason and J. F. Lacey, for appellee.

SEEVERS, J.—The Central Railroad Company of Iowa executed a mortgage to the Farmers' Loan & Trust Co., and, default having been made in the payment of the indebtedness secured, the trust company commenced an action in the United States circuit court to foreclose the mortgage, and therein asked for and secured the appointment of H. L. Morrill as receiver, who, as such, took possession of and operated the road. The receiver was operating the road on the sixth day of July, 1878, when, as the plaintiff claims, he was in the employ of the receiver as a brakeman, and was then injured by being run over by a train, because of the negligence of the engineer. This action, to recover damages sustained, was brought against the defendant, the receiver and the Central Railroad Company of Iowa. Neither the receiver nor the last named company appeared to the action, and no default or judgment was entered against either of them.

The mortgage was foreclosed, and the road and property embraced therein was sold by a master, and purchased by the Trust Company, to whom it was conveyed in trust for parties in interest. On the twentieth day of May, 1879, the

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United States circuit court ordered and decreed that the trustee and receiver transfer and deliver full and absolute possession of all of said property, together with all additions thereto, to the defendant, and said court further ordered and decreed as follows:

“And it is further ordered that the lawful debts contracted by the receiver during the litigation, and the costs and expenses of such litigation, do constitute and are hereby made a first and paramount lien upon all said property, moneys, credits, and all additions thereto, to all other liens, and to the title acquired by the purchaser at the foreclosure sale and by the conveyance to the Central Iowa Railway Company; and since it is not desirable to further continue said property under the control of the receiver for the purpose of making net earnings for the payment of said debts, costs and expenses, and the creditors having been notified, and making no valid or satisfactory objection thereto, it is further ordered and decreed that all said claims, and all claims pending in this court, debts and liabilities, including the claims of attorneys and others heretofore referred to special master Rogers, and reported on by him, and still pending on exceptions, shall be presented to the said Central Iowa Railway Company for adjustment and settlement; and the said Central Iowa Railway Company is ordered and directed to pay the said debts, costs and expenses; and the creditors entitled thereto are hereby required to accept payment thereof, with interest at the rate of seven per cent per annum, in one year from the date hereof, and for the purpose of enforcing the payment thereof, if need be, this court will and does retain jurisdiction of said cause, for the purpose of enforcing said payment and the lien herein provided for, without other action or independent proceeding.”

In accordance with this order and decree, the road and property were transferred to and accepted by the defendant. While the road was in charge of the receiver, the claim of the plaintiff for damages was presented to the circuit court

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aforesaid, and permission asked to bring a suit against the receiver. It was referred to a master to take evidence, who made a report to the court, and, as claimed by the plaintiff, the claim was presented to the defendant and payment demanded, which was refused.

The circuit court aforesaid made an order that the "plaintiff be permitted to bring suit at law in this court, or in the district or circuit court of Iowa, on his said claim, against the Central Iowa Railway Company, (defendant herein,) the Central Railroad Company of Iowa, and H. L. Morrill, receiver; that, if suit is brought in the state courts, its judgments and orders be certified to this court."

Afterward, on motion of Morrill, so much of the order was rescinded as permitted the plaintiff to bring an action against him, on the ground that he was not personally liable, and, as he had been discharged as receiver, he had no property in his hands which could be made liable to the payment of any judgment that might be obtained. The defendant, among other things, pleaded that it was not a party to the action in which the orders aforesaid were made, and that it could not be made liable for the debts of the receiver, and that the claim of the plaintiff was not one of the debts or liabilities that the defendant under the orders aforesaid was required to pay. The defendant, at the proper time, and in every way possible, made proper objections to everything which tended to show its liability, but the same were overruled. The foregoing statement is deemed sufficient to fairly present the important question we are required to determine.

I. It is provided by statute that "every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation. All the duties and liabilities imposed upon corporations owning or operating railways by this chapter shall apply to all

1. RAILROADS:
personal in-
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receiver:
statute con-
strued.

lessees or other persons owning or operating railways, as fully as if they were expressly named herein." Code, § § 1278, 1307.

Technically, it may be said that the road was in the charge of and under the control of the court, who, through or by its receiver, operated the road. As the court is neither a lessee nor person, it is said this action, under the statute, cannot be maintained.

While it is true that, in a general way, the road is in the charge of and under the control of the court, yet it is actually operated by the receiver, so far as the daily management of trains is concerned, and by what employes the same shall be run and controlled. The court cannot establish rules by which the receiver must be guided in such matters. As to these matters, the control of the receiver is just as absolute and unconditional as if he were the owner of the road. No action can be maintained against the court nor against its receiver, it will be conceded for the purposes of the case, unless the court so directs. But the receiver is a person, and, as the appointee of the court, is in fact operating the road. Usually railways are operated by corporations or their lessees. The statute includes them, and all "other persons owning and operating railways." The statute is remedial, and was evidently intended to include every possible person who was engaged in the operation of a railroad, whether for himself or for some other person. The court had control of the road for the time being for the persons or parties in interest, and was in fact having the road operated through its receiver for their benefit. We think the receiver was in fact operating the road, and the claim of the plaintiff was presented to the court by whom he was appointed, who investigated it and found it to be meritorious, and directed an action to be brought against its receiver for the purpose of having it judicially determined what amount was due, if anything. That the liability of the receiver is not personal may, possibly, be justly said. Any judgment obtained, however, could

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be satisfied out of the property in his hands, if the court by whom the receiver was appointed should so direct. But this in no manner affects the right of the plaintiff to have his claim judicially established.

We think the receiver is within the statute, and may be charged, and a recovery obtained against him, as a person who is engaged in operating a railway.

Conceding this to be so, counsel maintain that it by no means follows that the defendant is liable.

II. It must be conceded that the claim of the plaintiff was not a lien on the property in charge of the receiver at the time it was transferred or conveyed under the order of the court to the defendant. *White v. The K. & D. M. R. Co.*, 52 Iowa, 97; *B., C. R. & N. R. Co. v. Verry*, 48 Id., 458; *Jeffries v. Moran*, 101 U. S., 285; and it has been held that a railroad corporation cannot be made liable for the negligence of a receiver or his employees. *The O. & M. R. Co. v. Davis*, 23 Ind., 553. This last ruling is based on the thought that the receiver cannot be regarded as the agent of the corporation, and we think the receiver in the case at bar was not the agent of the defendant. We incline to think that the latter cannot be held liable, unless the property in the hands of the appellant can, under the order of the court, be charged with the payment of this claim. The order made by the court is exceedingly broad, and includes "claims, debts and liabilities." Against whom? The answer must be—the receiver, or property which in his hands was liable for the payment of the plaintiff's claim, debt or liability. We have determined that the receiver, or rather the property in his charge, was liable for the payment of the plaintiff's claim. The appellant, therefore, received the property charged with this liability. If it had been made a condition in the order that appellant, before the property was transferred or conveyed to it, should execute a written obligation binding itself to pay this claim, and it had done so, its liability, we think, would not be doubted. There would have been a sufficient consideration

2. —: —: recovery against company taking from a receiver the road burdened with the liability.

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for the promise. What was done in legal effect amounts to the same thing. The jurisdiction of the court must be conceded. It had possession of the road through its receiver, and, during the time it was operated by the receiver for the court, a supposed liability to the plaintiff occurred. The court, in substance, said to the appellant: "We will discharge the receiver and place the road, and all property and rights connected therewith, in your possession, and vest you with the legal title thereto, provided you will assume and pay all liabilities incurred during the time the road has been operated by the receiver." The appellant accepted the road upon the conditions annexed. There was an offer and an acceptance. Ordinarily, this is sufficient to constitute a contract. Whether there was a valid contract or not is not material, because the appellant cannot retain the property and repudiate the conditions. If the appellant was entitled absolutely to the property, it should not have accepted, but contested by appeal or otherwise the legality of the conditions. It is true, the appellant was not a party to the action of foreclosure, but it became a party to the order when it accepted the property. Whether the order of the court was valid or not, we have no occasion to determine in this collateral proceeding, because its validity is not assailed, and possibly could not be successfully, for the reason that appellant's possession, if not its title, is based thereon. We think the plaintiff is entitled to recover of the defendant. Whether, or in what manner, the judgment can be enforced, is not before us.

III. The plaintiff was a brakeman on a freight train, and he was directed by the conductor to cut off the four rear cars of the train while it was in motion. To enable him to perform this duty, it was necessary to reverse the engine, so that the rear portion of the train would move faster than the forward part thereof, and thus produce the necessary slack to enable the plaintiff to pull the pin which coupled the cars together. It was the duty of the engineer to keep the engine reversed

3. VERDICT :
evidence to
support :
practice in
supreme
court:

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until the plaintiff signaled him to go ahead. When pulling the pin, the plaintiff stood on the rear of the car in front of those which were to be detached, which was his proper place. The negligence which, it is alleged, caused the accident, was that of the engineer, who, as claimed, started the engine ahead before the plaintiff had given him the requisite signal, and this caused the plaintiff to be thrown from the car, and he fell on the track, and the four rear cars passed over a portion of his body. The appellant insists that the plaintiff gave the signal to the engineer, and that the accident was caused by his own negligence. The plaintiff testified that he did not give the signal, and the jury, in answer to a special interrogatory, so found. The conductor, Langdon, a brakeman and the engineer testified that the plaintiff did give the signal to go ahead. It may, therefore, be said that the evidence is conflicting, but we are unable to say that the plaintiff is not worthy of belief, when both the jury and the court below must have concluded that he was. If he was not, the jury should not have found as they did, and the court should have set aside the verdict and granted a new trial. In substance, we are asked to disbelieve the plaintiff and give credence to the evidence of the witnesses for the defendant. We do not have these witnesses before us, and cannot, therefore, test their credibility as well as the jury or the circuit court. Their opportunity to do so was much better than ours. If the jury believed the plaintiff, the verdict is right, and they must have done so. Some witness was no doubt mistaken. It is not our province to overrule both the jury and the circuit court in the conclusion reached as to who was mistaken, when all the facts before them are not before us.

IV. Whether the plaintiff was guilty of contributory negligence depends upon whether he used due precaution at the time and directly after he pulled the pin. It is said that he should have taken hold of the brake-rod, or wheel, or something else, to steady himself in anticipation of a "jerk." We think this was a question for the jury. We cannot

4. RAILROADS:
personal injury
to brakeman: contributory negligence: question for jury.

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say as matter of law that it was the duty of plaintiff to do as it is claimed he should have done. No positive duty was enjoined on him, but, under the circumstances, it was a matter of judgment and discretion on his part, which the jury have found was properly exercised.

V. It is said that the plaintiff was not an employe of the receiver, but an intermeddler, and therefore he cannot recover.

5. ———; The undisputed facts are that one Voorhees was
 authority of a brakeman in the employ of the receiver, and
 conductor to he desired to have a rest for a week or more, and
 employ the plaintiff took his place on the train, with the
 brakemen: knowledge and consent of the conductor, on the first day of
 liability of July, and continued to perform the duties of brakeman until
 company. the sixth day of said month, when he was ordered by the
 conductor to perform the duty in discharging which he was
 injured. The conductor testified that to properly manage
 the train two brakemen were required, and that there was
 but one other on the train besides the plaintiff. This evi-
 dence is not controverted. It does not clearly appear that
 the receiver or any of his employes, other than those on the
 train, had knowledge that the plaintiff was acting as brake-
 man. An intermeddler is a person who officiously intrudes
 into a business to which he has no right. The distinction
 between an intermeddler and a trespasser is not in any case
 very great. Under the circumstances of this case, if the
 plaintiff was an intermeddler, he was a trespasser. But, as he
 was on the train, and discharged the duties of brakeman for
 six days with the knowledge and consent of the conductor,
 he was not either. The train, when passing between stations
 and distant from any other officer, is in charge of the con-
 ductor, and he has authority to eject such persons therefrom.
 So far from so doing, the conductor availed himself of the
 services of the plaintiff, and required him to perform duties
 which were necessary and essential to the safe operation of
 the train. The regular brakeman was absent, and it is im-
 material whether with or without cause. The conductor con

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sented that the plaintiff should perform his duties. We think, when the regular brakeman is absent, and the proper and safe management of the train so requires, the conductor has authority to supply the place of the absent brakeman, and, for the time being, such person is an employe of the conductor's principal. Of necessity, it seems to us, the conductor must have such authority.

Counsel for the plaintiff cite and rely on *Everhart v. The T., H. & I. R. Co.*, 4 Am. and Eng. R. R. Cases, 599; *Kelly v. Johnson*, 128 Mass., 530; *Sherman v. H. & St. J. R. Co.*, 72 Mo., 62; *Snyder v. R. R. Co.*, 60 Id., 413, and *Flower v. Pa. R. Co.*, 69 Pa. St., 210. In none of these cases was the person injured on the train, engaged in the performance of any duty, with the knowledge of any one occupying the same relation to the principal as the conductor of the train in question did. As bearing, at least somewhat, on the same question in principle as that under discussion, see *Wilton v. Middlesex R. R. Co.*, 107 Mass., 108.

VI. It is insisted that the court erred in permitting evidence to be introduced tending to show that the conductor hired the plaintiff, and what the conductor said at that time. This evidence was not material or prejudicial, for the reason that, on the undisputed facts, the plaintiff was entitled to recover. It is further insisted that the conductor did not have authority to hire the plaintiff. It is true, no such power was conferred, nor was the conductor prohibited from so doing, should an emergency arise. This, however, is immaterial, because, as we have held, an implied authority existed.

VII. It is said that the court should have sustained a motion for judgment for the appellant on the special verdict. This thought is largely based on the eleventh special finding, which is as follows: "State what opportunity, if any, plaintiff had of taking hold of or supporting himself that he did not avail himself of." The jury an-

6. —: personal injury to brakeman: sundry rulings of the court considered and approved.

• THE SAME.

swered as follows: "We think the end of the board car was within reach, but plaintiff had no opportunity to avail himself of it after the jerk came." This finding is consistent with the general verdict. The theory of the plaintiff was, and the jury have so found, that the train started without being signaled to do so, and the "jerk" came sooner than the plaintiff expected. As he did not give the signal, he had reason to believe there would be no "jerk." He, therefore, was not required to take hold of anything till the time arrived when there would be danger if he did not do so. It must be remembered that the train was, for the time being, under the control of the plaintiff, and he had the right to act in accordance with this fact.

Counsel for the defendant in this connection discuss the evidence, and maintain that there was no unusual "jerk," and that if there was it did not occur until after the plaintiff gave the signal to go ahead. In relation to these matters, it is deemed sufficient to say that there was a conflict in the evidence, and therefore we cannot interfere.

VIII. It is urged that the court erred in giving the first, second and third paragraphs of the charge. The instructions above named are in accord with the views herein-
THE SAME. before expressed, and therefore are not erroneous. The modification of the fifth instruction asked was necessary to make it accord with the second paragraph of the charge. At the request of the appellant, the court instructed the jury that, if they believed that the plaintiff or any witness had sworn falsely as to any material question, they might wholly disregard his evidence, and refused the tenth instruction, which substantially repeated the same proposition. This does not constitute reversible error. For the reason heretofore stated, the court did not err in refusing the eleventh and thirteenth instructions asked by appellant.

IX. The court did not err in modifying the ninth special interrogatory propounded to the jury at the request of appellant. The interrogatory asked was as follows:
THE SAME. "Who employed the plaintiff?" To which the

court added: "And how was the employment made?" In the view we have taken of the case, the interrogatory as asked might have been refused, because the fact sought to be elicited was immaterial, and this is also true as to the modification, and therefore the appellant was in no manner prejudiced by the action of the court.

X. It is said that the court erred in not fully stating the issues to the jury, and in not "instructing fully upon the question of contributory negligence."

THE SAME.

We think the issues were fully and fairly stated to the jury, and the court said to them that, before the plaintiff could recover, he must satisfy them "that the plaintiff did not by his own fault or negligence himself contribute to his injury." The point urged is not, therefore, well taken.

XI. We deem it unnecessary to extend this opinion by stating at length our reasons for holding that the court did

not err in the admission or rejection of evidence,

THE SAME.

in refusing to set aside the special findings, or in refusing to set aside the general verdict and to grant a new trial, because what we have said sufficiently indicates, we think, that none of the objections are well taken.

We have endeavored to consider, and believe we have, all the material errors assigned which have been discussed by counsel. The case has been ably tried both in this court and the court below, and the appellant has not failed because of a want of zeal and ability on the part of counsel.

AFFIRMED.

WILLIAMS V. WELLS.

1. **Practice in Supreme Court: TRIAL DE NOVO UPON AGREED STATEMENT OF FACTS.** Where by the agreement of the parties the facts in an equity cause are reduced to a statement in writing, such statement takes the place of the depositions or the oral testimony reduced to writing, as contemplated in section 2742 of the Code, and a cause tried in the court below upon such a statement is triable *de novo* in this court.
2. **Partition: APPEAL FROM DECREE IN: AT WHAT POINT IN THE PROCEEDINGS TO BE TAKEN.** A decree in an action for the partition of real estate, settling the shares and interests of the parties, is in effect final as to those shares and interests, and from such a decree an appeal will lie; and it is the better practice, to say the least, to take an appeal at that point in the proceedings, rather than to wait until after the approval and confirmation of the report of the commissioners, whose only duty it is to divide the land or proceeds in accordance with the terms of that decree.
3. **Fraud: SALE OF LAND BY AGENT: CONCEALMENT OF ADVERSE INTEREST: AGENT CANNOT PROFIT BY: ESTOPPEL.** Where plaintiff's father was the owner of certain real estate, and had long lived apart from his wife, (who was an inmate of an insane asylum in a distant state,) and had married another woman, by whom he had several children, and from whom, after many years of cohabitation, he had been divorced; and defendant, knowing the facts concerning the second pretended wife, but knowing nothing of the existence of the first and real wife, (who was also plaintiff's mother,) but believing her to be dead, was induced by plaintiff, acting as his father's agent, to purchase of his father the land in question, accepting a deed therefor in which plaintiff's mother, who was still living, did not join:—*held* that, in the absence of evidence to the contrary, the law will presume that plaintiff knew that his mother was living, and that she had an interest in the land; that his participation in the sale of the land and his concealment of his mother's interest was a fraud upon defendant, and that, after the death of his father and the subsequent death of his mother, he could not, as the heir of his mother, claim, as against the defendant, an interest in the real estate.

Appeal from Lee District Court.

WEDNESDAY, SEPTEMBER 19, 1883.

ACTION in chancery to partition certain real estate, being parts of two lots in the city of Keokuk. The plaintiff claims to be the owner of the undivided one-third of the property,

and alleges in his petition that the defendant owns the undivided two-thirds. The defendant denies the interest and claims set up by plaintiff, and alleges that he holds the title to the whole property. Upon a trial on the merits, the district court entered a decree confirming the title in plaintiff to the undivided one-third of the property, and appointing commissioners to make partition thereof and report their proceedings as required by statute. Defendant appeals.

Anderson Bros. & Davis, for appellant.

Hagerman, McCrary & Hagerman, for appellee.

BECK, J.—I. The petition alleges that plaintiff is the only child and heir of Catharine and B. A. Williams; that his mother died in 1876, and his father in 1872; that the father owned the property in controversy, and in 1872 conveyed it to defendant; that the mother did not join in the deed, or make any relinquishment of her dower interest in the real estate, and that, upon the death of the father, plaintiff's mother became seized of the undivided one-third of the property, which, upon her death, descended to plaintiff. The answer alleges that the property was conveyed to defendant in exchange for other property in the city of Keokuk, of equal value, deeded by defendant to B. A. Williams in his life time. The defendant made further allegations in his answer in the following language:

“That defendant did not know of the existence of Catharine Williams, but in good faith supposed said B. A. Williams to be unmarried, having been shortly before divorced from Margaret E. Williams, whom defendant in good faith supposed to have been the wife of said B. A. Williams; that plaintiff knew of the existence of said Catharine Williams and of her rights (if any) in and to the property in controversy, yet, so knowing, he concealed the existence of said Catharine Williams from the defendant, and, by his conduct, induced and allowed the defendant to make the exchange as

aforesaid, and defendant, relying upon the supposed fact that said B. A. Williams was unmarried, made the exchange of property aforesaid, and parted with his property upon the faith of such supposed fact."

It is further alleged that, after the death of B. A. Williams, plaintiff, as heir, took possession of the property deeded by defendant to his father, and afterwards sold and conveyed it by deed of warranty. The plaintiff in reply admits the trade and conveyance between defendant and his father. He alleges that he had no connection with the trade, except as the agent of his father, and had no knowledge of the existence of his mother at the time, and acted in good faith, and denies that defendant was induced by his conduct or representations to make the conveyance to his father, or relied upon them. Other allegations of the pleadings need not be here recited. The case was submitted and tried upon an agreed statement of facts set out in a stipulation, which is in the following language:

"For the purpose of abridging the testimony herein, it is agreed:

"1. That B. A. Williams and Catharine Williams were legally married in the state of New York, on or about September 16, 1831; that they lived and cohabited together as husband and wife until on or about the day of , 1840, during which time Horace Williams, the plaintiff in this action, was born of said parents, and that the plaintiff is the only surviving child of said Catharine Williams.

"2. That B. A. Williams, father of the plaintiff, died in Keokuk, Iowa, on or about the 31st day of December, 1872, and that Catharine Williams, mother of the plaintiff, died intestate in an insane asylum in Onondaga county, New York, on or about the 25th day of December, 1876.

"Catharine Williams never deeded, released or devised any interest she may have had in the property in question in this case, either before or after her husband's death. It is not admitted that she had any interest, except in so far as the facts may tend to establish an interest, if any.

"3. That Catharine Williams, about the day of , 1840, became insane, and was placed in an insane asylum in Onondaga county, N. Y., where she remained an insane woman continually until the day of her death, on December 25, 1876.

"4. That B. A. Williams removed to the west about 1842, with a woman with whom he lived and cohabited, claiming to be husband and wife, until shortly before the 31st day of November, 1846, when she procured a decree of divorce from him in the district court of Lee county, Iowa, at Ft. Madison, a copy of which decree is hereunto attached, marked Exhibit A, and made part hereof.

"5. That afterwards, to-wit, on or about the 6th day of May, 1849, the said B. A. Williams and Margaret E. Steele had a ceremony of marriage performed at Keokuk, Iowa, and from that time until about 1872 they, the said B. A. Williams and the said Margaret E. Williams (formerly Steele) lived and cohabitated together, claiming to be husband and wife, and were recognized by the community in Keokuk, Iowa. That several children were born to them. That, for about ten years after their marriage, plaintiff lived with his father, the said B. A. Williams, and the said Margaret E. Williams, as one of the family. That said B. A. Williams, while said Margaret E. Williams lived with him, treated and held her out to the world as his wife, that she joined in several deeds with B. A. Williams, as his wife, releasing dower therein to their grantees; that two or three deeds for real estate were thus made to the plaintiff from B. A. Williams and Margaret E. Williams, aforesaid, and that, while plaintiff lived with his father, he recognized and treated the said Margaret E. Williams as the wife of his father.

"6. That on or about the 1st day of October, 1872, the said Margaret E. Williams obtained a decree of divorce from the bonds of matrimony against the said B. A. Williams, and about \$10,000 alimony from the said B. A. Williams, in the district court of Lee county, Iowa, at Keokuk. A copy of

which decree is hereto attached, marked Exhibit B, and made part hereof.

"7. That prior to November 13, 1872, B. A. Williams was the owner in fee simple of the property in controversy.

"8. That on the 13th day of November, 1872, the said B. A. Williams exchanged the said property in controversy with Guy Wells for the northeast one-half of lot 6, block 5, in the city of Keokuk, and, in pursuance of such contract for the exchange of said pieces of property, the said B. A. Williams made, executed and delivered a warranty deed, conveying the property in controversy to Guy Wells, naming the consideration therein \$5,000, and Guy Wells made, executed and delivered a warranty deed, conveying the northeast one-half of lot 6, in block 5, in the city of Keokuk aforesaid, to the said B. A. Williams, also naming the consideration of \$5,000.

"9. On the 24th day of March, 1877, Horace Williams made, executed and delivered to Sarah E. Williams, his wife, a warranty deed, conveying to her the northeast one-half of lot 6, in block 5, aforesaid, and on the 23d day of January, the said Sarah E. Williams and Horace Williams, her husband, made, executed and delivered a quit claim deed, conveying the said northeast one-half of lot 6, block 5, aforesaid, to John H. Craig, Wm. Collier, M. A. Ballinger and Sarah J. Gelatt.

"The foregoing admissions and agreement are made subject to objections by either party on account of immateriality or irrelevancy.

"10. The defendant, Wells, at the time of making the trade of said pieces of real estate, did not know anything about the marriage of Catharine Williams, mother of the plaintiff, with the said B. A. Williams, nor did he know anything of the existence and continued life of said Catharine Williams, but at the time of said trade in good faith supposed that B. A. Williams had no wife, and also in good faith supposed that he was getting the entire title of said real estate described in the petition. The plaintiff took part in the negotiations of said trade as agent of B. A. Williams, and, as such agent, signed

a contract with said defendant in the name of B. A. Williams, by himself as agent, which he was authorized to do, a copy of which contract is attached hereto as part hereof—Exhibit C, and it is admitted that the defect of title, or cloud, mentioned in said agreement, referred to the absence of any evidence of record of a deed from Wm. Armstrong to Joel Hargrove, shown in the abstract attached to petition in this case.”

The exhibit C, referred to in the tenth paragraph of the statement of facts, is a contract executed December 31, 1872, by B. A. Williams, by his agent, Horace Williams, plaintiff, and the defendant, which provides that Williams shall at his own expense prosecute a suit to quiet the title of the property involved in this action. Certain stipulations concerning rent, taxes and other matters are also found in the contract. They need be no more particularly referred to in this opinion. The exhibits A and B mentioned in the stipulation are sufficiently understood, without reciting any part of their contents. It will be observed that the conveyance by B. A. Williams to defendant was executed November 13, 1872. The contract, exhibit C, was entered into December 31, 1872, and Williams died on that day.

Upon the agreed statement of facts, and the documents therein referred to as exhibits, the district court found that the title to the undivided one-third of the lot conveyed to defendant by B. A. Williams is in plaintiff, and confirmed the same in him, and appointed commissioners to make partition of the property and report the action to the court.

II. Before reaching the merits of the case, two preliminary questions arise, which we are required first to consider. The

1. PRACTICE
in supreme
court: trial de
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agreed state-
ment of facts.

plaintiff insists that, as the case was tried in the court below upon an agreed statement of facts, it is not triable *de novo* in this court. The statute provides that in chancery actions the evidence offered at the trial shall be taken down in writing, or that the evidence shall be taken in the form of depositions, upon the order of the court, or upon the election of the parties. The

Williams v. Wells.

evidence thus reduced to writing is certified to this court upon appeal, whereon the case is tried anew. Code, § 2742 Counsel insist that the evidence in this case was not taken down in writing or in the form of depositions and certified by the judge of the district court, and that a trial *de novo* cannot, therefore, be had in this court.

The agreed statement of facts takes the place of evidence. It is, indeed, the evidence upon which the case was tried. The facts of a case are brought to the knowledge of a court by evidence, which may be in different forms, as oral testimony, or testimony in the form of depositions, or in the form of documents. Where by the agreement of the parties the facts are reduced to a statement in writing, it takes the place of depositions, or of the oral testimony reduced to writing. The statement thus becomes the evidence in the case. The object of the agreed statement is to dispense with depositions or oral testimony upon the trial. By so presenting the testimony, the parties avoid cost and delay, and are enabled to present to the court the facts in a clearer and briefer form, thus expediting and making more certain the administration of justice. Now, it surely cannot be the purpose of Code, § 2742, to prevent or discourage the trial of actions in this manner. In providing that actions shall be tried upon oral evidence reduced to writing at the trial, or upon depositions, it cannot be held that a method of introducing the evidence agreed upon by the parties by a written statement shall not be regarded as a substitute of other methods which shall take their place. The agreed statement is, therefore, to be regarded as depositions or oral testimony reduced to writing. It secures to the parties the same rights of a trial *de novo* as they would have, had it not been selected to take the place of the other forms of evidence. A contrary rule would impose expense upon litigants which they are willing to avoid by agreement, and would delay proceedings in the courts. We do not hesitate to say that the statute contemplates the practice, which has always prevailed, of submitting facts upon agreed

statements, and intends that cases so tried shall take the course of actions wherein the testimony is introduced in another form. The amended abstract filed by plaintiff shows that the agreed statement was duly certified by the judge trying the case to be all the evidence heard at the trial. The case, in our opinion, is triable here *de novo*.

III. Counsel for plaintiff insist that the appeal in this case is not triable *de novo*, for the reason that the judgment appealed from is not final. Under the statute, the rights of the parties in partition cases are determined, and their respective interests in the land are settled, by a decree. Such a decree was rendered in this case, and from it this appeal is prosecuted. Commissioners are appointed to make partition of the land, and, upon their report being approved, the shares are confirmed to the parties as awarded by the report. See Code, §§ 3289, 3296. It will be observed that the decree settling the rights and interests of the parties to the land is in effect final, so far as to settle the rights of the parties. Subsequent orders and decrees are supplementary in character, and are intended to effectuate the remedy provided by the law, to the end that the land may be partitioned between the holders of the title according to their respective interests. These supplementary proceedings, indeed, pertain to the enforcement of the final judgment determining the rights of the parties. While, doubtless, they may be reviewed by appeal, an appeal will lie from the final decree settling the interests of the parties—the decree appealed from in this case. Indeed, it appears that the interests of the parties in the land ought to be settled before the partition is made by the commissioners. In case of a reversal or modification of the decree settling the parties' interests, after the report of the commissioners and its confirmation by the court, the case would be again sent to the commissioners, thus requiring their action twice. So, as in this case, if it be held on appeal that partition ought not to be made for any reason, as that the title to all the land is in one

2. PARTITION:
appeal from
decree in : at
what point to
be taken.

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party, this should be determined before the commissioners make the partition, thus saving costs and expenses. We are not to be understood as holding that, upon an appeal taken after the confirmation of the commissioners' report, the final decree settling the interests of the parties in the land cannot be reviewed upon a trial *de novo*. We simply hold that an appeal may be prosecuted from such decree before subsequent proceedings are had, and that this course is the better practice. We find no case ruled by this court inconsistent with our conclusions.

IV. We are now brought to the consideration of the merits of the case, being required to determine whether plaintiff holds an interest in the real estate in controversy, which he can enforce against the defendant. Counsel have argued, at considerable length and with great care, questions involving the effect of the decrees divorcing B. A. Williams from the woman with whom he cohabited subsequent to his separation from plaintiff's mother, the effect of the exchange of property by him and defendant, the effect of plaintiff's conveyance of the property after the death of his father, the effect of B. A. Williams' warranty deed, the doctrines of lineal warranty and rebutter, and the doctrine of estoppel, as applicable to preclude plaintiff from setting up any interest in the land in conflict with the title conveyed by the warranty deed executed by his father to defendant. These questions involve interesting and important legal principles. We think their solution is not necessary for the correct disposition of the case, which, we think, ought to be based upon an estoppel arising from the conduct of plaintiff, and the relations he sustained to B. A. Williams and defendant. We will, in this connection, repeat some of the facts of the case, which will aid a clearer understanding of the principles upon which our conclusion is based.

The plaintiff, as agent of his father, "took a part" in the negotiations which resulted in defendant's purchase of the

3. FRAUD :
 sale of land
 by agent :
 concealment
 of adverse in-
 terest : agent
 cannot profit
 by : estoppel.

land and the conveyance by B. A. Williams by a warranty deed. The law will presume that defendant bought the property believing and understanding that it was free of any dower claim, and that Williams had no living wife, who, upon his death, would be entitled to dower in the land. Williams, by selling the land and warranting the title, represented that defendant would acquire a title subject to no such infirmity. The plaintiff, as agent, by his acts and conduct, represented the same thing. The law will not permit an agent thus by his conduct to induce the purchase of lands, and afterwards to set up a title which he induced the purchaser to believe did not exist. The agent by his fraudulent representations is forever estopped to deny the title he induced the purchaser to accept. The equity and good morals of the rule are obvious. Suppose plaintiff, while making the negotiations for the sale of the property, had informed defendant that B. A. Williams had a living wife, the plaintiff's mother:—the trade would have fallen. The law will presume that defendant would not have accepted a title encumbered with a possible dower interest. Plaintiff, as agent of his father, was bound to the same degree of honest and fair dealing which the law imposed upon his principal, his father. His concealment or silence was a gross fraud, of which the law will permit him to reap no advantage. Defendant was induced to make the trade by the silence of plaintiff and his father; for, as we have said, he would not have made it had the truth been imparted to him.

The law will presume that plaintiff knew of the existence of his mother, and of her rights as a wife in the property. While he alleges in his answer that he was ignorant of her existence, there is not one word of testimony supporting this allegation. It is possible that a man may not know that he has a mother living; but usually men know whether their mothers be dead or living, and, as a rule, all men, while their mothers are living, know that fact. The law, in the absence of proof, will presume in accord with the general rule, and

Williams v. Wells.

not with an exception, which is a bare possibility. The law will, therefore, presume that plaintiff knew, when he negotiated the sale to defendant, that the wife of B. A. Williams, plaintiff's father and principal, was living. It will presume, further, that plaintiff knew the provisions of the law securing to her dower rights.

We have, then, the case of fraudulent conduct of plaintiff, whereby he represented that B. A. Williams' deed would convey the title of the land free from any dower interest; the knowledge of plaintiff that the title was burdened by the interest of a living wife of the grantor, and the fact that defendant was induced to make the purchase by the conduct of plaintiff. It further appears that defendant was ignorant of the existence of the wife of B. A. Williams, and the law will presume that plaintiff intended by his conduct to induce defendant to purchase the property. This conduct, of course, as all acts of men, was prompted by a purpose. In the absence of any proof of the purpose, the law will presume that it was connected with the business in which it arose, and that plaintiff's concealment and silence were intended to induce defendant to purchase the property. We find in the case, as the foregoing considerations clearly show, all the elements of an estoppel based upon conduct. See Bigelow on Estoppel, p. 480. We reach the conclusion that the court below ought to have entered a decree settling the title of the property in defendant, and declaring that plaintiff is forever estopped to set up any claim or title thereto as heir, either of B. A. Williams or of his mother, Catharine Williams. The decree of the district court is reversed, and the cause is remanded for a decree in harmony with this opinion.

REVERSED.

BALL V. THE KEOKUK AND NORTHWESTERN R'Y CO.

62	751
88	433
62	751
92	430

1. **Statute of Limitations:** THE RUNNING OF NOT DELAYED BY NEGLIGENCE IN MAKING DEMAND. Where the right of action depends upon some act of the plaintiff, such as the making of a demand, he cannot, by failing to do such act, prevent the statute of limitations from running. And in this case, where plaintiff seeks to recover of the defendant for the appropriation of land for right of way, and defendant sets up as an equitable defense a written agreement of plaintiff to convey the land upon demand after the location of its road, and defendant neglected for more than ten years after the location of its road to demand a deed, *held* that, in the absence of special circumstances excusing the delay, the cause of action pleaded as an equitable defense was fully barred, whether it be regarded as a cause of action based on a written contract, or an action brought for the recovery of real property.

Appeal from Lee Circuit Court.

FRIDAY, SEPTEMBER 21, 1883.

THE petition states that the plaintiff is the owner of certain real estate, and that defendant entered thereon without his consent, destroyed fences, committed waste, and has taken and appropriated a strip of land for right of way, and has constructed its road thereon, without having obtained the right to do so; wherefore a recovery is asked. The defendant pleaded an equitable defense, and alleged that in 1869 the plaintiff executed a contract in writing, whereby he agreed to convey the right of way over a portion of the premises described in the petition to the Keokuk and Minnesota Railway Company, and that, at the same time, Cassel, under whom the plaintiff claims, executed a similar contract, whereby he agreed to convey the right of way over another portion of the premises to the last named company. It is stated that the defendant has acquired all the rights of the Keokuk and Minnesota Company. As to another portion of the land, the defendant pleads and relies on an oral contract, under which plaintiff, for a named consideration, agreed to convey to defendant the right of way over the same.

Ball v. The Keokuk & Northwestern R'y Co.

The relief asked, in substance, is that the plaintiff specifically perform said contracts.

The court directed the equitable defense to be first tried, and found for the plaintiff. A decree was accordingly entered, and defendant appeals.

Anderson Bros and Davis, for appellant.

D. W. Sprague and Hagerman, McCrary & Hagerman, for appellee.

SEEVERS, J.—The written contracts under which the defendant claims are as follows:

“In consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, we do hereby agree to convey to the Keokuk and Minnesota Railway Company the right of way for a double or single railroad track, not exceeding one hundred feet in width, the same to extend through lands as follows: * * * *, the same to be deeded to the aforesaid company on demand, after said road shall have been located through the said described lands.”

The court ordered that defendant make a more specific statement as to when the road was located over the lands in question, and when a deed was demanded.

In compliance therewith, the defendant stated in an amended pleading that the “Keokuk and Minnesota R. R. Co. located its roadway over the lands described in the petition in the year 1869, and that in the month of August, 1880, a demand was made on the plaintiff that he execute a deed in compliance with his bond for a deed, which he refused to do.”

Upon the trial it was “admitted that the road was located by the engineers of the Keokuk and Minnesota R. R. Co. in 1869.” There is some evidence tending to show that there was a location made in 1870, but we think, under the statements made in the pleadings, and admissions on the trial, that we must, for the purpose of the case, hold that the road was located in 1869.

Ball v. The Keokuk & Northwestern R'y Co.

The plaintiff's action was commenced in October, 1880, but the answer of the defendant, pleading the equitable defense, was not filed until March 9, 1881. The demand for a deed was not made until more than ten years had passed after the road had been located. The plaintiff insists that the equitable defense is barred by the statute of limitations.

I. It is provided by statute that actions "founded on written contracts, * * * * * and those brought for the recovery of real property, must be commenced within ten years" after the cause of action accrues. We think the cause of action stated in the answer as an equitable defense is based on and brought to enforce a written contract; but whether this is so or not is immaterial, for, if brought to recover an interest in land, it is also barred in ten years after the cause of action accrues.

The important inquiry is, therefore, when did the cause of action accrue? The deed was to be executed on demand after the location of the road. No cause of action accrued, it will be conceded, until after demand. But the demand should be made within a reasonable time. Ordinarily, what is a reasonable time must depend on circumstances. We have held that, where the right of action depends upon some act to be done by the plaintiff, he cannot, by failing to do such act, prevent the statute from running; as where the plaintiff had a right of action against a county for services performed, but before bringing it he was required to present his claim to the board of supervisors. *Baker v. Johnson Co.*, 33 Iowa, 151. Under the Revision, the purchaser at a tax sale was entitled to a deed three years thereafter. In *Hintrager v. Hennessy*, 46 Iowa, 600, the purchaser at a tax sale was entitled to a deed in December, 1864, but did not procure it until May, 1871, more than five years after the sale, which was the period of limitation for bringing the action, and it was held that the action was barred. It has been held, when a right of action depends upon a demand, that such demand must be made

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within the period prescribed by the statute of limitations; that is, in the case at bar, the right to a deed depended on the location of the road. When the road was located in 1869, a demand for a deed could have been made, but, as this was not done until more than ten years had elapsed after the right to make the demand accrued, the cause of action pleaded as an equitable defense was fully barred. *Keithler v. Foster et al.*, 25 Ohio St., 27; *Palmer v. Palmer*, 36 Mich., 488; *La Forge v. Jayne*, 9 Pa. St., 410; *Pittsburg and Connellsville R. R. Co. v. Byers*, 32 Id., 22; *Morrison, Adm'r, v. Mullin*, 34 Id., 12; *Codman v. Rogers*, 10 Pick., 112.

In other words, these cases hold that, where there are no special circumstances which excuse the party from making the demand, and the same is not made within the time prescribed in the statute, then it is not made within a reasonable time, and this, we think, is the correct rule.

The appellant contends that equity regards that as done which a party has agreed to do, and that the simple non-user of the right of way, which is an easement in land, for the period prescribed in the statute of limitations, will not create the bar of the statute. In support of this proposition, *Wright v. LeClaire*, 4 G. Greene, 420; *Barlow v. The C., R. I. & P. R. Co.*, 29 Iowa, 276, and *Noll v. D., B. & M. R. R. Co.*, 32 Id., 66, are cited.

Under the statute in force when the first of the above cases was decided, it was held that an action for specific performance was an action affecting real estate, and, therefore, the statute barring real actions applied. It was not determined within what time a demand should be made. Since that decision, the statute has been materially changed, and in *Newman v. De Lorimer*, 19 Iowa, 244, it was held that actions upon written contracts, whether the same were at law or in equity, were equally within the statute of limitations.

Now, the equitable defense is based on written contracts, and seeks to enforce an equitable right to real estate. The statute clearly applies. In the *Barlow* and *Noll* cases, above

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cited, there was an express grant of the right of way; but not so in the case at bar. Here there is a mere agreement to convey on demand. The plaintiff was not bound to convey until a demand was made. We think the rule that equity regards that as done which a party has agreed to do, only applies where the party has bound himself independently of any contingency which may or may not occur.

II. As to a portion of the land, the appellant claims to be entitled to the right of way under a parol contract. The claim is that the appellant offered, and the appellee agreed to take, \$60 for the right of way, and that appellant tendered the money and entered into possession under the contract, which it also claims has been established by the evidence of the plaintiff.

The witnesses who testified in relation to the oral contract were the plaintiff, one Bank, and Anderson, vice-president of the defendant. An effort had been made to condemn the right of way upon a certain line, and a sheriff's jury did so; but, because of some informality, this condemnation was abandoned, whereupon Anderson, acting for the defendant, made an offer to purchase the right of way as above stated. Both Ball and Bank testify that the offer was accepted upon the condition that the right of way should be the same as had been condemned; that is, over the same land. We do not understand Anderson to deny in terms that such was the understanding.

The most that can be said is that he states the transaction somewhat differently. But be this as it may, we think the preponderance of the evidence as to this matter is with the plaintiff. We also think the preponderance of the evidence is with the plaintiff as to the question whether the right of way taken under the oral contract is the same as that condemned. We think the defendant has failed to establish the oral contract as claimed by it, and, therefore, is not entitled to its specific performance.

AFFIRMED.

APPENDIX.

NOTES OF CASES NOT OTHERWISE REPORTED.

DUKE, EX'R, v. BAUGH ET AL.

RECORD INSUFFICIENT: JUDGMENT AFFIRMED.

Appeal from Mahaska Circuit Court.

TUESDAY, OCTOBER 16.

PER CURIAM.—As there is neither an assignment of errors nor an argument for appellant in this case, the judgment of the circuit court must be
AFFIRMED.

BOWER v. KAVANAUGH ET AL.

QUESTIONS CERTIFIED NOT INTELLIGIBLE: APPEAL DISMISSED.

Appeal from Polk Circuit Court.

THURSDAY, DECEMBER 6.

THIS action involves less than \$100. It was tried before a justice of the peace, and taken by a writ of error to the circuit court, where the judgment of the justice was reversed and the plaintiff's petition dismissed, and judgment rendered against him for costs. Plaintiff appeals.

Likes & Hoff, for appellant.

Barcroft, Bowen & Sickmon, for appellee.

ROTHROCK, J.—The questions certified to this court by the trial court are utterly unintelligible in and of themselves. They can be understood only by an examination of the whole record. The appeal must, therefore, be dismissed for failure to comply with the rule of this court applicable to such cases. See *Votaw v. Corwin*, *ante*, 39.

APPEAL DISMISSED.

THE CITY OF KNOXVILLE V. FOSTER.

RECORD INSUFFICIENT: JUDGMENT AFFIRMED.

Appeal from Marion District Court.

FRIDAY, DECEMBER 7.

*W. S. Kenworthy, for appellant.**Smith McPherson, Attorney-general, for the State.*

DAY, CH. J.—The defendant, upon information before the mayor of the city of Knoxville, was convicted of a violation of the city ordinances of said city. He appealed to the district court, where, upon jury trial, he was again convicted, and fined fifteen dollars and costs. The cause is submitted upon the transcript, without argument for the appellant.

The transcript contains no bill of exceptions, evidence or instructions. The record discloses no error.

AFFIRMED.

THE STATE V. QUIGLEY ET AL.

RECORD INCOMPLETE: APPEAL DISMISSED.

Appeal from Marshall District Court.

MONDAY, DECEMBER 10.

*Lincoln King, for defendant.**Smith McPherson, Attorney-general, for the State.*

DAY, CH. J.—This case was submitted upon the written transcript, without printed abstract. The transcript contains the evidence, the instructions given and refused, and the motion for a new trial, but, aside from the instructions and the motion for new trial, it does not show that the defendants were indicted, nor that they were tried, nor what verdict was returned, nor that any judgment was entered. The record also fails to show that the defendants have appealed. In this condition of the record, we cannot entertain jurisdiction of the appeal. No course is left for us but to order that the appeal be

DISMISSED.

CLIME v. PHIPPS.

NO BRIEF OR ARGUMENT BY APPELLANT: APPEAL DEEMED ABANDONED,
AND IS DISMISSED.

Appeal from Page Circuit Court.

MONDAY, DECEMBER 10.

THIS is an action in equity, by which the plaintiff claims to be the owner of certain real estate, which, it is alleged, she inherited from Washington Phipps, deceased. The ground of the claim is that she is the illegitimate and only child of Phipps, and that in his lifetime he recognized her as his child, and that such recognition was general and notorious and in writing. The defendants are the persons who would inherit from Phipps if the plaintiff's claim of childhood is not sustained. The court entered a decree for the plaintiff, and defendants appeal.

H. W. Maxwell and T. E. Clark, for appellant.

W. B. Moon, for appellee.

ROTHROCK, J.—The appellants have filed an abstract, and the appellees have filed an amended abstract and an argument. The appellants have presented no brief nor argument. We presume that they intend to abandon the appeal, or they would in some manner indicate to this court why or wherein the decree of the court is erroneous.

AFFIRMED.

TEETER v. QUINN.

EASEMENT: NOTICE TO PURCHASER: PRESCRIPTION.

Appeal from Harrison District Court.

SATURDAY, DECEMBER 8.

ACTION at law to recover damages for the obstruction of an alleged right of way over land, and for the obstruction of a highway which is claimed to have been established by prescription. There was a trial by the court, and a judgment was rendered for the defendant for costs. Plaintiff appeals.

S. H. Cochran, for appellant.

Evans & Roadifier, for appellee.

ROTHROCK, J.—I. It appears from the evidence that the plaintiff is the owner of twenty acres of land, adjoining land formerly belonging to one Spires. Spires fenced his land and placed his fence on or near the line between the two tracts. The plaintiff enclosed her land, and erected the fence some twenty-five or thirty feet from the line, thus leaving a lane or passageway which was all on plaintiff's land. This lane ran north and south, and at its north end it opened out on vacant land owned by Spires. The plaintiff claims that an oral agreement was made between her and Spires, by which each party was to keep up and maintain his part of the lane fence, and that the plaintiff should also have a right of way over Spires' uninclosed land north of the lane. Afterwards, Spires sold and conveyed all of his land to one Runkles, and Runkles conveyed the same to the defendant, and he, desiring to enclose his land north of the lane, erected a fence around the same, and thus prevented any travel from the end of the lane to the north.

The plaintiff claims that the defendant had notice of the right of way when he bought his land, and recognized the rights of plaintiff, and is bound by the contract made between the plaintiff and Spires. We think the court was justified in finding from the evidence that the defendant did not have notice, and that he did no act by which he should be held to furnish the plaintiff a right of way through his land to the north of the lane. If the lane was in whole or in part upon the land of the defendant, there might be some claim that he was bound to take notice of the rights of parties using the lane.

II. It is claimed that the lane, and a traveled track over defendant's land to the north of the lane, was established as a highway by prescription. Upon the question as to the amount of public travel over the road, the evidence is conflicting. The lane was but twenty-five or thirty feet wide, and some of the witnesses testify that it was used and traveled very little, and that it could not be traveled to any great extent, owing to its bad condition. There is no such a showing of general use and travel as would authorize us to interfere with the finding of the court, that the public acquired no right by use and travel upon the lane, as claimed by the plaintiff.

AFFIRMED.

RULES
OF THE
SUPREME COURT

GOVERNING PROCEEDINGS FOR THE

ADMISSION OF ATTORNEYS TO PRACTICE THE LAW

IN THE

COURTS OF THIS STATE,

UNDER

Chapter 168 of the Acts of the Twentieth General Assembly.

ADOPTED SEPTEMBER 18, 1884.

Rule 1.—Examinations of applicants for admission to the bar shall be had at the September terms at Council Bluffs, the October terms at Dubuque, the April terms at Davenport, and at all regular terms at Des Moines, on the mornings of the first days in which the court shall be in actual session.

Rule 2.—Each applicant for admission shall, before the first day of the term of court at which he asks to be examined, file with the clerk of this court a written request for examination, in his own handwriting, and signed by himself, together with the proofs of his qualification as to age, residence, character, and time and place of study, required by section two of chapter 168 of the Acts of Twentieth General Assembly, all prepared and presented in the form prescribed by these rules.

Rule 3.—The court will appoint, on the morning of the day of the examination, a committee of not less than three members of the bar, who shall assist in the examination of applicants for admission.

Rule 4.—The justices of this court will prepare not less than thirty questions, to be submitted to each applicant in writing or print, which he shall answer in writing. A proper and convenient room shall be provided for the use of the applicants, wherein they may prepare their answers without interruption. While so engaged, they shall have access to no books, and have no communication with anyone. The written or printed questions shall be varied at each term.

Rule 5.—Upon consideration of the oral and written examinations and the proofs of qualification, the court will admit or reject the applicant.

Rule 6.—The proofs of the qualifications of the applicants as to age, character, place of residence, and time and place of study, shall be by affidavit made before some officer authorized to administer oaths. When made before an officer not having a seal, other than a judge of the supreme, district or circuit courts of the state, his official character and signature shall be authenticated by a proper certificate attested by the seal of the clerk of a court of record.

The proof of the applicant's good moral character, residence in the state, and age, shall be by the affidavits of at least two witnesses, and the applicant shall also make affidavit of his age and place of residence.

The proof of his time of study shall be by the affidavit of the member of the bar with whom he pursued his studies; and, when he has studied at a law school, such fact, and his term of study there, shall be shown by the affidavit of one or more of the professors or instructors of such school. Such affidavit shall show that the applicant has actually and in good faith pursued the study of the law for the term prescribed by the statute, and the fact that the affiant is a practicing lawyer, or is a professor or instructor in the law school at which the applicant studied.

Rule 7.—An attorney admitted to practice in another state, before admission here, shall furnish proofs of good moral character, that he is twenty-one years of age, is a resident of this state, and has practiced law regularly for not less than one year in the state wherein he was admitted, by like affidavits provided for in the preceding rule.

When such affidavits are made before an officer not having a seal, the official character of the officer, and his authority to administer oaths, as well as the genuineness of his signature, shall be shown by the certificate of the clerk of a court of record under the seal thereof.

Such attorney admitted in another state, shall also file, with the other proofs required, a copy of the record of the court showing his admission to the bar, which shall be duly proved as required by law for the authentication of the records of the courts of sister states when offered in evidence in the courts of this state.

Rule 8.—The graduates of the law department of the State University may be orally examined, at Iowa City, by a committee of not less than three members of the bar appointed by this court. They shall also answer written or printed questions prepared by the justices of this court, as prescribed by rule number four, under the same restrictions and conditions as to being kept from communication with others and consultation of books. Upon the report of the committee, as prescribed by the statute, and upon a certificate signed by the members thereof to the effect that the examination was fairly conducted and the answers to the written or printed questions were prepared by the applicant without opportunity for consultation with persons or books, and upon presentation of the diploma of the applicant, together with his answers to the written or printed questions, this court shall determine upon the question of his admission to the bar, and, if admitted, the court may direct that the oath prescribed by the statute may be administered at Iowa City, and, when done, the fact shall be reported by the person administering the oath to the clerk of this court, who shall make proper record thereof.

Rule 9.—The proofs of qualification as to age, good moral character, residence in the state, and time and place of study, being required by the statute in cases of students of the Law Department of the University, must, in all instances, be presented by them upon application for admission.

Rule 10.—In estimating the time of study, a school year of thirty-six weeks, spent in a reputable law school in the United States, shall be equivalent to a full year spent in an office, and a fraction of a school year, spent in a reputable law school in this state, shall be considered equivalent to the same fraction of a full year spent in an office.

Rule 11.—These rules shall take effect immediately.

ORDERED BY THE COURT:

That the foregoing rules be adopted, and that the clerk cause one thousand copies of the same to be printed, and that he send five copies thereof to each of the judges and clerks of the courts of this state, and that they be published in the sixty-second volume of the Iowa Reports.

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2. TO SUPREME COURT: PRACTICE: ASSIGNMENT OF ERROR: TOO INDEFINITE. Where a motion for a new trial was based on several grounds, and it is assigned as error simply that the court overruled the motion, this is too indefinite and must be disregarded. *Marsel v. Bowman*, 57.

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2. ———: RIGHTS OF PARTIES. While it was held in *Wing v. Page*, (No. 1, *ante.*) that payment to the assignor of an open account, after notice of the assignment, is a good defense to an action by the assignee, yet the assignee could not, after the assignment, compel payment to him. *Bailey v. U. P. R'y Co.*, 354.
3. EQUITABLE: OF PARTICULAR FUND: FACTS CONSTITUTING. No particular form of words is necessary to create an equitable assignment of a fund. Anything which evinces an intent to do so is sufficient. And where parties, by an order absolute in its terms, assigned to a bank, as security for advances, the money due and to become due them from the county upon a contract, and afterwards drew checks upon the bank to various parties, "to be paid as soon as we settle with the county," which checks the bank accepted, to be paid in the order of presentation, out of and to the extent of the fund, *held* that these facts constituted an equitable assignment, irrevocable—to the bank, of so much of the fund as was necessary to reimburse it for advances made, and to the payees of the checks, in their order, of so much of the fund as was necessary to pay them, so long as the fund should hold out. *County of Des Moines v. Hinkley*, 637.
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3. **PARTNERSHIP: INDIVIDUAL INDEBTEDNESS OF PARTNER: FACTS NOT CONSTITUTING.** See Partnership, 3.

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1. **TOO INDEFINITE.** Where a motion for a new trial was based on several grounds, and it is assigned as error simply that the court overruled the motion, this is too indefinite, and must be disregarded. *Marsel v. Bowman*, 57.
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3. **TENDER: ADMISSION OF AMOUNT DUE.** Where before the trial of an attachment suit the defendants tendered and paid into court a sum of money for the plaintiff, this was a conclusive admission that that amount was due when the attachment was sued out. *Id.*
4. **COUNTER-CLAIM FOR DAMAGES: EVIDENCE OF EMBARRASSED CONDITION OF DEFENDANT.** Upon a counter-claim for damages for the malicious suing out of an attachment, evidence that the defendant in attachment was greatly involved in debt was admissible, as tending to show that plaintiff was not actuated by malice. *Id.*
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4. FIDELITY REQUIRED. An attorney who takes to himself the legal title to lands which belong in equity to his client, cannot avoid his responsibility as trustee for his client, on the ground that the client came to his interest in the lands through a conveyance made in fraud of the creditors of the grantor. *Id.*
5. INFIDELITY NOT REWARDED. Where an attorney, unfaithful to his client, takes to himself the legal title to lands which in equity belong to his client, himself paying the balance due on the lands, and afterwards sells the lands at a profit, he cannot be allowed to share the profits, but must account therefor to his client. *Id.*
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the sale; and, in an action for specific performance and general relief, the court properly refused to decree a specific performance, but it was error to make the amount paid to the attorney a lien upon the land, since the money never came into the hands of defendant. *Hampton v. Moorhead*, 91.

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cost of such house, being incurred for the public good, could not be charged to the infected person or persons confined therein. *Staples v. Plymouth County*, 364.

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1. **SELECTION OF OFFICIAL NEWSPAPER: CERTIORARI TO REVIEW.** The proprietor of a newspaper has no such interest in the selection by the board of supervisors of the official papers of the county as to enable him to maintain an action of *certiorari* to review the proceedings of the board in making the selection, to the end that his own paper may be selected as one of such papers; and this, even though his paper be one of the two having the largest circulation in the county. See *Welch v. Supervisors*, 23 Iowa, 199; *Smith v. Yoran*, 37 Id., 89. *Iowa News Co. v. Harris*, 501.

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Votaw v. Corwin, 62, 39. Appeal to supreme court: Less than \$100. *Bower v. Kacan-uagh*, 756.

Wagner v. Bissell, 3, 396. Animals at large. *Haughey v. Hart*, 98.

Warrington v. Pollard, 24, 281. Tender: Costs. *Martin v. Whisler*, 417.

Watson v. Van Meter, 43, 76. Practice in supreme court. *Wirs v. Foster*, 116.

Wey v. Ill. Cent. R'y Co., 40, 341. Contract: Negligence. *Killeringham v. Sioux City & Pac. R'y Co.*, 288.

Webber v. Sullivan, 63, 259. Will: Insanity. *Stephenson v. Stephenson*, 167.

Wells v. B., C. & N. R'y Co., 66, 620. Bill of exceptions. *Tootle, Livingston & Co. v. Phanix Ins. Co.*, 803; Contract: Negligence. *Coates v. B., C. & N. R'y Co.*, 493.

Welsh v. Board of Supervisors, 23, 199. Official newspaper: Certiorari. *Iowa News Co. v. Harris*, 502.

White v. Keokuk & Des M. R'y Co., 62, 97.

Railroads: Personal injury: Lien. *Sloan v. Cent. Iowa R'y Co.*, 733.

White v. Rowley, 46, 680. Judicial sale of homestead. *Owens v. Hart*, 622.

Wilhelm v. Cedar County, 60, 234. County: Agency. *Call v. Hamilton County*, 450.

Wing v. Page, 62, 87. Assignment of account: Notice. *Bailey v. Union Pac. R'y Co.*, 358.

Winspear v. Dist. Twp. of Holman, 37, 542. Municipal corporations. *Curry v. Dist. Twp. of Sioux City*, 103.

Winter & Co. v. Hudson, 51, 336. Mechanics' lien. *Andrews & Smith v. Burdick & Goble*, 718.

Wise v. Ray, 3 G. Greene, 430. Contract. *Dows & Co. v. Morse & Lilly*, 233.

Wright v. Howell, 35, 288. Redemption. *Bunce v. West*, 81; *Newell v. Pennick*, 121.

Wright v. LeClaire, 4 G. Greene, 429. Statute of limitations: Land. *Bail v. Keokuk & N. W. R'y Co.*, 754.

Young v. Broadbent, 23, 539. Practice: Error waived. *Cruter v. Chi., M. & St. P. R'y Co.*, 462.

Zugg v. Turner, 8, 233. Assignment: Notice. *Wing v. Page*, 83.

CERTIORARI.

1. WILL NOT LIE TO REVIEW ACTION OF COUNTY SUPERVISORS IN SELECTING OFFICIAL NEWSPAPERS. See Board of Supervisors, 1.

CHANGE OF VENUE.

See VENUE.

CHATTEL MORTGAGE.

1. FORECLOSURE IN EQUITY: IDENTITY OF GOODS: EVIDENCE. Where G. mortgaged a certain building and the stock of goods therein to plaintiff, and afterwards removed the goods to another building, and then made a second mortgage of the goods to W., describing them as situated in the second building, in an action against G. and W. to foreclose the first mortgage, *held* that plaintiff was properly permitted to prove the removal and identity of the goods, without any allegations of removal and identity in his petition. *Odell v. Gallup*, 253.
2. PRIORITY: PRESUMPTION. Where a chattel mortgage was made upon a stock of goods, and afterwards another mortgage was made to another upon the same stock, and it appeared that *some* of the original goods were on hand when the second mortgage was made and when the action for foreclosure of the first mortgage was begun, and it did not appear what, if any, goods had been added to the stock, or the value thereof, *held* that, since the court is unable to determine that the first mortgage did not cover *all* the remaining goods, it must be given priority over the second mortgage as to all. *Id.*
3. INSUFFICIENT DESCRIPTION. A chattel mortgage which describes the mortgaged property as "all the cut and growing and having grown" on the land described, is not sufficient to convey to third parties notice of a lien created thereby upon the *crops* grown upon the land. *Cray v. Currier*, 535.

CHURCH.

1. REINSTATEMENT OF EXPELLED MEMBER BY MANDAMUS. See Mandamus, 1.
2. UNINCORPORATED: DEVISE TO: VALIDITY OF. See Will, 13.
3. INTERFERENCE OF COURTS WITH. See Corporation, 8.
4. PROTESTANT EPISCOPAL: RIGHT OF PARISH TO DISSOLVE PASTORAL RELATION. See Contract, 21.

CITIES AND TOWNS.

1. INJURY ON SIDEWALK: EVIDENCE. See Evidence, 2.
2. ACTION AGAINST: QUALIFICATION OF RESIDENTS AS JURORS. See Jury, 1.
3. CRIMINAL ORDINANCES: PRACTICE UNDER. See Criminal Law, 1, 2.
4. ORDINANCE: PART ILLEGAL—REMAINDER VALID. Where an ordinance, besides prohibiting the sale of malt and vinous liquors, which the town had authority to do, prohibited also the sale of intoxicating liquors, which it had no power to do, *held* that the ordinance could be enforced as to the sale of malt and vinous liquors. *Town of Eldora v. Burlingame*, 32.
5. ———: EVIDENCE OF PUBLICATION. In the absence of a statute to the contrary, oral evidence is competent to prove the publication of an ordinance. *Id.*
6. PASSAGE OF ORDINANCE: SUSPENSION OF RULES: PRESUMPTION. Where the record of a town council recites that the rules were suspended upon the passage of an ordinance, the record will, in a collateral proceeding, be conclusively presumed to be correct, though it fails to show the number of votes cast for and against the proposition to suspend. *Id.*
7. ESTABLISHED FRONTAGE OF LOTS TO BE RESPECTED BY PERSONS BUILDING OUT-HOUSES. See Nuisance, 1.
8. RIGHT OF WAY FOR STREET: PARTY DEFENDANT. A corporation which holds a lease, perpetual at its option, of certain ground, has a right to be heard in a proceeding to establish a city street over the ground. *Town of Storm Lake v. Iowa Falls & S. C. R'y Co.*, 218.
9. VOID ORDINANCE: POWER OF LEGISLATURE TO LEGALIZE. See Constitutional Law, 2.
10. RAILWAYS ON STREETS: POWER OF CITY UNDER SPECIAL CHARTER. Under § 464 of the Code, as affected by chapter 96, laws of Eighteenth General Assembly, a city acting under a special charter has no power to authorize a railway company to use a street for railway purposes, without compensation to the owners of lots abutting upon the street. *Stange v. City of Dubuque*, 303.
11. ———: ACTION AGAINST CITY: EVIDENCE. See Railroads, 18.
12. RIGHT TO PROTECT TERRITORY FROM OVERFLOW. See Water-courses, 1.
13. BOARD OF HEALTH OF: POWER TO BIND COUNTY FOR COST OF PEST-HOUSE. See Board of Health, 1.

CODE OF 1873.

1. ENACTMENT OF: EFFECT ON PRIOR STATUTES. See Statutes, 1.

CONSTITUTIONAL LAW.

1. SECTIONS 2572-3-4 OF THE CODE OF 1873, PROVIDING FOR SUBSTITUTION OF DEFENDANTS IN REPLEVIN CASES, HELD UNCONSTITUTIONAL. See Replevin, 3.
2. POWER OF LEGISLATURE TO LEGALIZE VOID ORDINANCE. Where a city acting under a special charter has passed an ordinance which is void, because not authorized by its charter, and the legislature could not grant power to the city to pass the ordinance without violating article 3, section 30, of the constitution, which inhibits local or special legislation in certain cases, *held* that the legislature could not indirectly accomplish the same result by an act validating the void ordinance, and that an act passed for that purpose was unconstitutional. *Stange v. City of Dubuque*, 303.
3. RIGHT OF LEGISLATURE TO TAKE AWAY EXEMPTION FROM TAXATION. See Taxation, 1.
4. POWER OF LEGISLATURE TO VALIDATE VOID ORDER OF COUNTY SUPER-INTENDENT CHANGING BOUNDARIES OF SCHOOL DISTRICTS. See School District, 4.
5. STATUTE PROVIDING FOR REVIEW OF CAUSES, INCLUDING CHANCERY CAUSES, INVOLVING LESS THAN \$100, UPON QUESTIONS CERTIFIED—See CODE, § 3173—IS NOT REPUGNANT TO SECTION 4, ARTICLE 5, OF THE CONSTITUTION. See Appeal, 12.

CONTINUANCE.

1. FACTS WARRANTING DENIAL OF. A motion for the continuance of this cause was properly overruled, because it appears from the facts of the case (see opinion) that the moving party, notwithstanding the grounds of its motion, had ample time to produce its witnesses, and was not prejudiced by the ruling of the court. *Winklemans v. The Des Moines & Northwestern R'y Co.*, 11.

CONTRACT.

1. DURESS: FACTS CONSTITUTING. Where a woman's husband was illegally restrained in the office of an attorney, who represented to her that unless she executed a mortgage on her homestead her husband would be arrested on a charge of felony, and she executed the mortgage solely to avoid his arrest, *held* that the mortgage was obtained under duress, and was void. See *Greene v. Scranage*, 19 Iowa, 461. *First National Bank of Nevada v. Bryan*, 42.
2. —: MORTGAGE OBTAINED BY: INNOCENT HOLDER. While it has been held by this court that a *bona fide* indorsee before maturity of a note secured by a mortgage, without notice of infirmities, takes the mortgage as he takes the note, free from the defenses to which it is subject in the hands of the mortgagee, (see cases cited,) yet this doctrine will not be extended to a case like this, where the mortgage was upon the homestead of a woman who did not sign the note, and whose signature to the mortgage was secured by duress. *Id.*

3. **ASSIGNMENT OF RAILROAD "TIME CHECKS": CONTRACTOR NOT BOUND BY.** This action was brought against the principal contractors upon an assignment of certain "time checks" signed by the sub-contractor; but these time checks not purporting to be an obligation of the principal contractors, judgment against them was properly refused. *Nash & Phelps v. The C., M. & St. P. R'y Co.*, 49.
4. **A REQUEST IS INCLUDED WITHIN THE PROPER DEFINITION OF THE TERM CONTRACT.** See Will, 1.
5. **IMPLIED PROMISE ON THE PART OF A LAND OWNER TO REIMBURSE ONE WHO BY MISTAKE PAYS TAXES ON THE LAND.** See Tax, 1.
6. **SIGNED BY ONE PARTY ONLY: EVIDENCE.** A contract which has been signed by one of the contracting parties only, but which has been recognized and acted upon by both, is binding upon both, and is admissible in evidence in an action between them. *Douss & Co. v. Morse & Lilly*, 231.
7. **AGENCY: TENANCY IN COMMON.** Under the contract involved in this case, (see opinion,) whereby defendants were to purchase corn with plaintiffs' money, held that defendants were the agents of plaintiffs, and not tenants in common with them of the corn. *Id.*
8. **SECONDARY EVIDENCE TO ESTABLISH.** Where plaintiff succeeded to the business of C., and undertook the performance of a contract previously entered into between C. and defendants, and, in an action between plaintiff and defendants, growing out of the transaction, plaintiff and C. denied the existence of the contract, it was proper to allow defendants to establish the execution and terms of the contract by secondary evidence. *Louis Cook Manuf. Co. v. Randall & Dickey*, 244.
9. **TERMS OF ASSUMED BY THIRD PARTY.** Where defendants ordered goods of C. on certain terms, and plaintiff assumed to fill the order in C's stead, and shipped the goods to defendants, who accepted the same, plaintiff and defendants became parties to the original contract, and were both bound by the terms thereof. *Id.*
10. **TO FURNISH GOODS ON CREDIT: MEASURE OF DAMAGES FOR BREACH OF.** Where plaintiff doing business at Cincinnati, Ohio, assumed to furnish on credit to defendants vehicles for sale at Des Moines, Iowa, with the sole privilege to sell such vehicles in certain counties, the element of credit became an important element in determining the damages to which defendants were entitled upon a breach of the contract; and the measure of defendants' damages for such breach was the difference in the contract price of the vehicles and their market value in the city of Des Moines, with the exclusive privilege of selling such vehicles in the counties named in the contract, less the expense of bringing the vehicles from Cincinnati and fitting them up for the Des Moines market. *Id.*
11. **LANGUAGE OF TRADE: EVIDENCE.** Where in a contract language is used which has a peculiar meaning understood by the trade, that meaning must be followed in enforcing the contract, and evidence of such meaning is properly admissible. *Id.*
12. **FOR LAND: RESCISSION AFTER POSSESSION TAKEN.** The grantee of real estate under a contract, after he has taken possession, cannot have the contract rescinded because his grantor has fraudulently, and in violation of the contract, kept him out of possession for a time. He will be remitted to his action at law for his damages for the detention. *Wilson v. Irish*, 260.

13. **FOR SALE OF LAND: COMPLIANCE NECESSARY TO CONSUMMATE.** Where defendant proposed to sell certain land to plaintiff for a price named, provided plaintiff sent \$300, and paid \$100 nearly due on a mortgage, and the plaintiff accepted the terms, but did not pay as required, *held* that the contract was not consummated, and that plaintiff could not afterward recover of defendant for his refusal to convey the land. *Bundy v. Dare*, 295.
14. **WAGER: REPUDIATION OF BY LOSING PARTY: LIABILITY OF STAKEHOLDER.** See *Wager*, 1.
15. **ILLEGAL: EXECUTED: PARTIES EQUALLY GUILTY.** Parties equally at fault, or equally violators of law, can have no remedy against each other based upon contracts or transactions which are esteemed unlawful. It was accordingly *held* that, where the agent of a railway company, in violation of chapter 63, Acts of the Fifteenth General Assembly, collected from himself, as a shipper of goods, a rate of freight in excess of that provided by law, and paid the same over to the company, he was, equally with the company, a violator of the law, and that he could not recover from the company the penalty provided in said act for such illegal charges. To be "equally guilty" in such a case does not imply the same degree of guilt, nor guilt subjecting the wrong-doers to the same punishment, but only that both should be in fact partakers of the guilt. *Steerer v. Ill. Cent. R'y Co.*, 371.
16. **IN RELATION TO INSURANCE.** See *Insurance*, 1, 2.
17. **TO BUILD HOUSE: ABANDONMENT OF BY CONTRACTOR AND ASSIGNMENT TO SURETIES: EQUITIES AS BETWEEN SURETIES AND CREDITORS.** Where a building contractor abandoned his work, and, for the purpose of protecting his sureties, assigned his contract and turned over the work to them, with the understanding that they should finish the building, and, with the money received upon the contract, pay for the materials and labor furnished, and account to him for the profits, if any, *held* (1) that "the materials and labor furnished" had reference to what should be furnished at the times the several installments became due under the contract, and not to what was furnished at the time of the assignment; (2) that the sureties became trustees for the completion of the work, and that, as such, they had the right to use the money arising from the contract to execute their trust; that is, to complete the building; and that persons who had, prior to the assignment, furnished materials to the contractor, could not in equity, without having established a prior lien, demand the contract money needed to complete the building, for the purpose of paying the contractor's indebtedness to them for the material so furnished; (3) that the equities were no stronger of a material-man who held an order, given by the contractor before his assignment, upon an installment of the contract money which did not become due until it had been earned by the work and expenditures of the trustees. *Tuttle v. Ind. School Dist. of Harlan*, 422.
18. **PURCHASE OF LAND THROUGH AGENT: EXCESS OF AUTHORITY: LIABILITY OF AGENT.** Where the owner of land had leased the same to a tenant in possession for a term not yet expired, and had authorized his agent to sell the same subject to the lease, and the agent, knowing of the lease, represented to the plaintiff that he had authority to sell and give immediate possession of the land, and so negotiated a sale to plaintiff, taking \$200 from him as a cash payment, *held* that plaintiff, after learning of the lease, was not bound to accept from the agent a warranty deed from the owner but that he might reject the deed, and recover from the agent the \$200 paid him in the transaction. *Maichen v. Clay*, 452.

19. **PROCURED BY UNDUE INFLUENCE UPON A FEEBLE MIND: SET ASIDE.** Contracts made between persons sustaining relations of trust and confidence, where it appears that the stronger and controlling mind has obtained an advantage, are jealously watched and guarded by courts of equity, and are set aside, unless the beneficiary shows the good faith of the transaction; and in this case, where a daughter, through undue influence, and without adequate consideration, procured from her aged and infirm mother the execution of a note, and a mortgage securing the same, *held* that the court below properly canceled these obligations upon the petition of the heirs of the mother. *Spargur v. Hall*, 498.
20. **INJUNCTION TO RESTRAIN BREACH OF: FACTS NOT WARRANTING.** See Injunction, 4.
21. **EMPLOYMENT OF RECTOR BY PARISH OF PROTESTANT EPISCOPAL CHURCH: RIGHT OF PARISH TO DISSOLVE PASTORAL RELATION.** A parish of the Protestant Episcopal church, by its admission into union with the diocese of Iowa, and its connection through that with the Protestant Episcopal church of the United States, acknowledges the authority of the constitution and canons of that church, and becomes amenable thereto; and, according to these canons, a rector canonically elected and in charge may not be removed by his parish against his will. Neither may this be done indirectly by the reduction of his salary as contracted for at the time of his election. And, until the dissolution of the pastoral relation in some manner provided by the canons of the church, he may recover for his services the salary provided in the original contract. *Bird v. St. Mark's Church*, 567.
22. **FOR ERECTION OF COURT HOUSE: DISTRIBUTION OF FINAL PAYMENT AMONG CLAIMANTS.** Where the contractors for the erection of a court house made to one K. an order upon the county for a certain amount, to be paid "out of any money that may be due us on final settlement," but it appeared from the evidence that it was the intention that K. should be paid only out of the *profits* of the job, *held* that his order was entitled to payment only after satisfaction of material men, who held subsequent orders drawn by the contractors on the same fund, notwithstanding, because the building was a public one, they could not establish mechanics' liens thereon. And *held*, further, under the circumstances of this case, that K's order was payable only out of the profits of the work as contemplated when the order was given, and that he was not entitled to be paid thereon an amount due the contractors for extra work on the same building, subsequently contracted for; and the county, having paid the price of such extra work to the contractors, was not bound to pay it again upon K's order. *County of Des Moines v. Hinkley*, 637.
23. **AS AGENT TO SELL LAND: PERFORMANCE: FACTS NOT CONSTITUTING.** Where, by the terms of a contract, a real estate agent, upon "finding a purchaser" for a tract of land, was to receive certain compensation for his services, and he found one who said that he would take the land, but the owner, having then sold the land to another, was unable to make a deed to the agent's alleged purchaser, *held* that the agent could not recover the agreed compensation, without showing that the purchaser found by him was in a condition to comply with the contract, or to respond in damages for a failure so to do. *Iselin v. Griffith*, 668.
24. **SUBSCRIPTION TO CORPORATION STOCK: CANCELLATION OF: FACTS NOT WARRANTING.** See Corporations, 11.

CONVEYANCE.

1. **OF ENCUMBERED LAND: LIABILITY OF GRANTEE TO PAY THE INCUMBRANCES.** See Vendor and Vendee, 1.

2. **NOT DEFEATED BECAUSE EMBODIED IN A CONTRACT.** It is not essential that a deed of conveyance should follow any prescribed form of words; and, if the intention to convey is unmistakably expressed, it will not be defeated by the fact that the instrument also partakes of the nature of a contract. *American Emigrant Company v. Clark*, 182.
3. **CERTAINTY IN DESIGNATING GRANTEE.** Where a conveyance partakes also of the nature of a contract, and, taking the whole instrument together, there can be no uncertainty as to the person to whom the conveyance is made, it will not be defeated simply because the grantee is not formally named in the conveying part of the instrument. *Id.*
4. **CERTAINTY AS TO THE LAND CONVEYED.** Where a conveyance is embodied in a contract, and from the whole instrument it clearly appears what land was intended to be conveyed, the land will pass thereby, though not particularly described, and though reference to another deed may be necessary to ascertain the particular description thereof. *Id.*
5. **QUIT-CLAIM DEED: WHAT IS NOT.** A conveyance which employs the words—"have bargained, sold and quit-claimed, * * * * * all our right, title and interest, estate claim and demand, both at law and in equity, and as well in possession as in expectancy," is not a mere quit-claim deed. See *Sibley v. Bullis*, 40 Iowa, 429. *Wilson v. Irish*, 260.
6. **TESTAMENTARY IN CHARACTER: REVOCATION OF.** Where a conveyance contained words purporting to convey real estate in the usual form, but also contained the following language: "To commence after the death of both of said grantors;" and "It is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the grantors or either of them shall live;" *held* that no present estate to commence at a future day was created, as contemplated by section 1933 of the Code, and that the conveyance was testamentary in character, and could be revoked by the grantors at their option, notwithstanding a valuable consideration may have been paid therefor. *Leaver v. Gauss*, 314.
7. **DELIVERY: FACTS CONSTITUTING.** Where a father conveyed to his infant son an equitable interest in certain lands, and, as guardian for his son, delivered the conveyance to an attorney whom he as such guardian had employed for the purpose of procuring for the son the legal title to the lands, *held* that this constituted a delivery of the conveyance to the son. *Byington v. Moore*, 470.
8. **ABSOLUTE ON FACE MAY BE SHOWN BY PAROL TO BE A MORTGAGE IN FACT.** See Bill of Sale, 1.
9. **SET ASIDE FOR FRAUD.** See Fraud, 8.

CORPORATION.

1. **DEVISE TO: NOT DEFEATED ON ACCOUNT OF ILLEGALITY OF ORGANIZATION.** See Will, 1.
2. **WHETHER FOR CHARITY OR FOR PROFIT.** The articles of incorporation of "The Sisters of the Humility of Mary, Ottumwa, Iowa," considered, and the said corporation *held* to be one for charitable purposes, and not for the pecuniary profit of the corporators. *Quinn v. Shields*, 129.
3. **ULTRA VIRES.** It is not *ultra vires* for a corporation organized for the manufacture of certain articles to assume to fill a contract made with another for furnishing such articles. *Louis Cook Manufacturing Co. v. Randall & Dickey*, 244.

4. **FOR RELIGIOUS PURPOSES: HOW LONG THEY CONTINUE.** Whether the limitations placed by the statute upon the duration of corporations for pecuniary profit apply to religious corporations, *quære*. *Byers v. McCartney*, 339.
5. **DEVISE TO: LIMITATION OF WHERE THERE ARE HEIRS.** See Will, 13.
6. **DEVISE TO UNINCORPORATED CHURCH: HOW FAR VALID.** See Will, 13.
7. **AGGREGATE: MODE OF APPEARING AND ANSWERING AS GARNISHEE.** See Garnishment, 4.
8. **RELIGIOUS: INTERFERENCE OF COURTS WITH.** The civil courts will not revise the decisions of churches or religious associations upon ecclesiastical matters, but will interfere with such associations when civil or property rights are involved. *Bird v. St. Mark's Church*, 567.
9. **SERVICE OF ORIGINAL NOTICE ON AGENT: NO JURISDICTION.** See Original Notice, 4.
10. **FALSE CERTIFICATES OF PAID UP STOCK: LIABILITY OF CORPORATION.** Where a corporation, contrary to statute, but by the mutual agreement of its stock-holders, issues certificates of paid up stock when only a *pro rata* portion has in fact been paid, this may be ground for a proceeding in the interest of the public to wind up the concern, but it is not ground for one of the subscribers to the stock, and a party to the unlawful undertaking, to have his contract of subscription set aside, and his *pro rata* payment refunded. *Goff v. Hawkeye Pump & Windmill Co.*, 691.
11. **SUBSCRIPTION ON STOCK: FALSE PROMISES: CANCELLATION OF SUBSCRIPTION.** A subscriber to the capital stock of a corporation cannot have his contract of subscription set aside, and the amount paid thereon refunded, simply because the corporation, by its agents, represented that it would put a certain amount of working capital into the concern, and then failed to do so, when the subscriber well knew the condition of the corporation, and its lack of funds, and no specific method for raising the funds was agreed upon. *Id.*

COSTS.

1. **ON COUNTER-CLAIM: EFFECT OF OFFER TO CONFESS JUDGMENT ON PETITION.** Where the action was upon a promissory note, and the defendants pleaded a counter-claim, and afterwards offered to confess judgment for an amount less than was adjudged them upon the trial, and the trial involved only the issues raised by the counter-claim, which were found in defendants' favor, *held* that defendants were entitled to judgment for all costs made upon the trial of these issues, and that their insufficient offer to confess judgment was in no way connected with, and did not affect, this right. *McClatchey v. Finley*, 200.
2. **IN SUPREME COURT: ON PRINTING OF PAPERS FILED TOO LATE.** See Practice in Supreme Court, 12, 23.
3. **AVOIDANCE OF BY TENDER.** See Tender, 3.
4. **UPON ALLOWING AMENDMENT: NO PREJUDICE.** The taxing of accrued costs to plaintiff upon allowing an amendment to his petition could not have prejudiced him, where he failed upon the trial, and thus became liable for all the costs. *Keller v. Bare*, 468.

COUNTY.

1. LIABILITY FOR COST OF PEST-HOUSE BUILT BY CITY BOARD OF HEALTH. See Board of Health, 1.
2. LIABILITY FOR MILEAGE OF WITNESS SUBPENAED IN CRIMINAL CASE FROM BEYOND THE STATE. See Witness, 2.
3. POWER TO EMPLOY AGENT TO SELL SWAMP LANDS. While a county may have no power to employ an agent to sell its indemnity swamp lands, that duty being imposed by statute upon the board of supervisors, it has the power to employ an agent to find purchasers to whom the county may sell by its proper officers; and for services rendered in that capacity at the county's request the agent may recover reasonable compensation; and he cannot be defeated by the fact that the county had not the power to sell the particular land in question, if it had a general power to sell such lands. *Call v. Hamilton County*, 448.
4. OFFICIAL NEWSPAPERS: REVIEW UPON CERTIORARI OF ACTION OF SUPERVISORS IN SELECTING. See Board of Supervisors, 1.
5. EXEMPT FROM GARNISHMENT: WAIVER OF EXEMPTION. See Garnishment, 8.

COUNTY SUPERINTENDENT.

1. POWER OF TO CHANGE BOUNDARIES OF SCHOOL DISTRICTS. See School District, 3.

COVENANT.

1. OF WARRANTY: DAMAGES FOR BREACH OF. See Warranty, 1, 3; Vendor and Vendee, 2.

CRIMINAL LAW.

1. INFORMATION UNDER TOWN ORDINANCE: DUPLICITY: SURPLUSAGE. Where an information under a town ordinance charges an offense punishable under the ordinance, and also an offense punishable only under the laws of the state, the information is not bad for duplicity, but that portion charging an offense of which the town has no jurisdiction may be disregarded as mere surplusage, and it will not vitiate a judgment of conviction for the other offense. *Town of Eldora v. Burlingame*, 32.
2. —: —. Where a town ordinance authorized "any number of violations of the ordinance to be included in one complaint," an information under the ordinance charging more than one offense as defined therein was not bad for duplicity. *Id.*
3. ALIBI: MEASURE OF EVIDENCE. To establish an *alibi*, it is not necessary that the jury should be fully satisfied of its truth. But the evidence of an *alibi* cannot avail unless it preponderates. See *State v. Hamilton*, 57 Iowa, 598. *State v. Reed*, 40. See 21, *post*.
4. —: NOT PROPERLY A DEFENSE. *Alibi* is not a *defense* within any accurate meaning of the word, but a mere fact shown in rebuttal of the state's evidence; and it does not, therefore, demand a specific instruction from the court. *Id.*
5. PERJURY: OATH BEFORE TOWNSHIP ASSESSOR: ALLEGATION OF TIME IN INDICTMENT. A person cannot be convicted of perjury for taking a false oath before one not empowered by law to administer oaths; and, as

a township assessor is not authorized to enter upon his duties before the third Monday of January after his election, one who, before such assessor, falsely swears to an assessment of his property, prior to that time, does not thereby commit legal perjury. In such case the allegation of time in the indictment becomes material, and renders the indictment bad. *State v. Phippen*, 54.

6. **INDICTMENT: ROBBERY.** An indictment which charges that the defendant made an assault upon one L., "and with force and violence unlawfully and feloniously did steal, take and carry away from the person of the said L. four \$20 bills," etc., sufficiently charges the crime of robbery. *State v. Kegan*, 106.
7. **INSTRUCTIONS AS TO OFFENSES INFERIOR TO THE ONE CHARGED.** Where a person is charged with a crime which in its nature includes inferior offenses, and the evidence is such that the jury might find the defendant guilty of an inferior offense, the court should so instruct as to enable the jury to find according to the evidence. *Id.*, 106.
8. **LARCENY: PRESUMPTION OF GUILT FROM BAD ASSOCIATION OF DEFENDANTS: INSTRUCTION.** Where, on an indictment for the larceny of money from the person of the prosecuting witness, there was evidence tending to show that the house where the larceny was committed was a house of ill-fame, and that one of the defendants, against whom the evidence of guilt was strong, was the keeper of the house, and that the other defendants were inmates thereof, it was error to give the jury an instruction from which they might infer that because the defendants may have been partners in the crime of keeping a house of ill-fame, they might be presumed to be guilty together of the larceny committed therein. *State v. Graham*, 108.
9. **PRACTICE: MISCONDUCT OF DISTRICT ATTORNEY.** Courts should hold district attorneys to a strict observance of the statute which forbids them to refer to the fact that a defendant has not testified on his own behalf; and for a violation of the statute a judgment of conviction will be reversed. *Id.*
10. **EVIDENCE: MURDER: EXCLAMATIONS OF DEFENDANT'S WIFE.** The exclamations of a wife upon the killing of her son by her husband, made in the presence and hearing of the husband, are admissible as against him. The exclamation in this case was not a "communication" by the wife to the husband. *State v. Middleham*, 150.
11. ———: ———: **ERROR WITHOUT PREJUDICE.** Where certain evidence had no other tendency than to establish the grade of the offense, but the jury found the defendant guilty of the lower grade, the defendant was not prejudiced thereby, and, if there was error in its admission, it was not reversible error. *Id.*
12. ———: **STATE NOT BOUND TO CALL ALL ITS WITNESSES.** While the state should be held to prove the whole transaction constituting a crime before the prisoner is put to his defense, this does not make it incumbent upon the state to call all the witnesses who were present at the transaction, where the whole transaction can be shown by a part of them. *Id.*
13. ———: **SELF DEFENSE: DANGEROUS CHARACTER OF DECEASED.** As bearing upon the question of self-defense in a prosecution for murder, the defendant might be permitted to show that he knew the deceased to be quarrelsome and dangerous; but in such case a question to a witness requiring him to state whether the manner of the deceased was "reckless" or "quiet" was properly ruled out. *Id.*

14. **MURDER: SELF-DEFENSE: OBLIGATION TO RETREAT.** A man who is assaulted in his own house need not retreat in order to avoid slaying his assailant in self-defense; but he must not even there take life, unless to all reasonable appearances it is necessary to protect himself and his home. *Id.*
15. **MINORS IN SALOONS: KNOWLEDGE NOT NECESSARY TO CONVICTION.** Under chapter 56, Acts of the Fifteenth General Assembly, (McClain's Statutes, 1019; Miller's Code, 968,) making it unlawful for the keeper of a billiard saloon, or his employes, to permit minors to remain in the saloon, a conviction may be had without proving that the defendant knew of the presence of the minor, or of the fact of his minority. See cases followed and distinguished cited in opinion. *State v. Probasco*, 400.
16. ———: **LIABILITY FOR OFFENSE OF SERVANT.** Under the statute aforesaid, if the saloon-keeper fails to enforce watchfulness on the part of his employes, and a minor is thus allowed to remain in his saloon, he and the employe are both guilty, and he cannot avoid punishment on the ground that the offense was the offense only of his servant.
17. **MANSLAUGHTER: INTENTION OF DEFENDANT: INSTRUCTION.** Upon an indictment for murder, the defendant asked the court to instruct the jury that his intentions in approaching the deceased must be presumed to be lawful, unless shown to be unlawful, and the court refused to give the instruction. *Held* that, if there was error in the ruling, it was cured by a verdict for manslaughter only, which did not imply any unlawful intention in approaching the deceased. *State v. Castello*, 404.
18. **HOMICIDE: NOT PALLIATED BY FEEBLENESS OF DECEASED.** A homicide cannot be excused or palliated on the ground that the manslayer was ignorant of the fact that his victim's feeble condition was such as to render him unable to resist or survive the violence inflicted. *Id.*
19. ———: **SELF-DEFENSE: INSTRUCTION.** There is no error in an instruction which, in effect, directs the jury that a homicide will be excused, where it appeared necessary to the accused, as an ordinarily prudent man, to take the life of the deceased in his own self-defense. *Id.*
20. **MANSLAUGHTER: DEFINITION OF: SELF-DEFENSE.** Self-defense excuses homicide; it has nothing to do in determining its degree. Hence it has no place in the definition of manslaughter, or of any other degree of homicide. *Id.*
21. **ALIBI AND INSANITY AS DEFENSES: BURDEN OF PROOF.** A defendant in a criminal cause, setting up as a defense *alibi* or insanity, has the burden of proof to establish these defenses. *State v. Bruce*, 48 Iowa, 530, and *State v. Hamilton*, 57 Id., 596 followed. *State v. Hemrich*, 414. See 3, *ante*.
22. **EVIDENCE: COMPETENCY OF WITNESS NOT BEFORE GRAND JURY.** Section 5, chapter 130, Acts of Eighteenth General Assembly, provides that an indictment may be found by the grand jury upon the minutes of the testimony duly taken, reduced to writing, and returned to the court by the committing magistrate; and this enactment so far supercedes section 4421 of the Code as to render a witness, whose testimony has been properly taken and returned by the magistrate, and whose name has been placed upon the indictment, competent to testify upon the trial, without having testified before the grand jury. *State v. Rodman*, 456.
23. ———: **FAILURE OF DEFENDANT TO PRODUCE TESTIMONY: PRESUMPTION.** Where a defendant in a criminal case fails to produce testimony which is within his power, but not accessible to the state, to explain facts

established by the state against him, the jury is warranted in inferring that such testimony, if produced, would be against him; but this does not mean that the failure of the defendant to testify in his own behalf is to be taken as proof of his guilt. *Id.*

24. ———: ATTEMPT TO ESCAPE: CONTRADICTORY STATEMENTS. Where defendant was charged with larceny, the facts that he had attempted to escape, and that he had made contradictory statements as to how he had come into possession of the property, tended, if proved, to show his guilt; and the jury was properly instructed to that effect. *Id.*
25. ———: GOOD CHARACTER. Evidence of good character avails for the defendant, whether the evidence of his guilt be direct or circumstantial; and an instruction, though asked by defendant, that such evidence avails only as against circumstantial evidence, was properly refused. *Id.*
26. ———: LARCENY: PRIMA FACIE CASE SUPPORTS VERDICT. In a larceny case, a verdict of guilty will not be set aside on the ground that the fact of the larceny was not sufficiently proved, when the evidence made at least *prima facie* case of larceny. *Id.*
27. PRACTICE: CHALLENGE TO JUROR: ERROR WITHOUT PREJUDICE. Where the defendant in a criminal case challenged a juror for cause, and the challenge was overruled, and the defendant afterwards challenged the juror peremptorily, without exhausting all his peremptory challenges, the error, if any, in overruling the challenge for cause, was without prejudice to defendant. *State v. George*, 682.
28. ———: ———: QUALIFIED OPINION AS TO GUILT. An opinion of a juror that the defendant is guilty, provided what he (the juror) has heard about the case is true, is not an unqualified opinion, and for the judge so to state during the examination of a juror was not error, nor was it prejudicial to the defendant, where his challenge—the one under consideration—was sustained. *Id.*
29. ———: GRATUITOUS REMARKS OF JUDGE: NOT COMMENDED, BUT NO GROUND FOR REVERSAL. Certain extended remarks made by the trial judge during the examination of jurors in this cause, pertaining to the intention of the legislature, and the effect of the statute in relation to murder, (see opinion,) while not regarded as being in consonance with the practice of this state, *held*, under all the circumstances, to have wrought no prejudice to defendant. *Id.*
30. MURDER: INSANITY AS A DEFENSE; EVIDENCE CONSIDERED: INFERENCE FROM EPILEPSY. Epilepsy is not necessarily such evidence of insanity as to excuse the subject of it from criminal responsibility; and, upon consideration of all the facts in the case, *held* that a verdict of guilt of murder in the first degree, and a sentence of death, could not properly be set aside by this court on the ground of insanity. *Id.*
31. INSTRUCTIONS TO JURY: STARE DECISIS. The law as announced in the opinion of this court in *State v. Fetter*, 25 Iowa, 67, which assumes to direct the method of instructing a jury in murder cases, has been too long followed and acquiesced in to be now questioned; and the instructions in this case, being in accord with that opinion, are approved, *Id.*

CROSS-EXAMINATION.

1. REPETITION NOT REQUIRED. See Practice, 1.
2. AS TO OWNERSHIP IN REPLEVIN. See Evidence, 75.
3. EXTENT OF CONTROLLED BY DISCRETION OF COURT. See Practice, 26.

.DAMAGES.

1. **FOR RIGHT OF WAY FOR RAILROADS: ELEMENTS OF: EVIDENCE.** See Railroads, 1-6.
2. **MEASURE OF FOR NON-DELIVERY OF PROPERTY PURCHASED.** See Sale, 2.
3. **MEASURE OF FOR BREACH OF CONTRACT TO FURNISH GOODS ON CREDIT.** See Contract, 10.
4. **FOR BREACH OF COVENANT OF WARRANTY.** See Warranty, 1, 3. Vendor and Vendee, 2.
5. **EXEMPLARY: NO AVERMENT NECESSARY FOR IN PLEADING.** See Pleading, 5.
6. **MEASURE OF IN CASE OF PERSONAL INJURY BY RAILWAY.** See Railroads, 25.
7. **ON INJUNCTION BOND.** See Injunction, 6, 7.

DEED.

1. **QUIT-CLAIM: WHAT IS NOT.** See Conveyance, 5.
2. **CERTAINTY OF DESCRIPTION OF LAND AND NAME OF GRANTEE.** See Conveyance, 3, 4.
3. **OF TRUST: BENEFICIARY NOT NAMED: ENFORCEMENT OF TRUST.** See Trust, 6.

DELIVERY.

1. **OF NOTES AND MORTGAGE WITHOUT AUTHORITY: RIGHTS AND LIABILITIES OF PARTIES.** See Promissory Note, 1.
2. **OF DEED OF ASSIGNMENT: FACTS CONSTITUTING.** See Assignment for Benefit of Creditors, 2.
3. **OF DEED: WHAT CONSTITUTES.** Where a deed from a father to a minor child is absolute in form and beneficial in effect, and the father voluntarily causes the same to be recorded, this is in law a sufficient delivery to the child, and will carry with it the title to the land. In such a case, manual delivery and acceptance are not necessary. *Cecil v. Beaver*, 28 Iowa, 246, followed. *Palmer v. Palmer*, 204.
4. **OF DEED FROM FATHER TO INFANT SON: FACTS CONSTITUTING.** See Conveyance, 7.

DEMAND.

1. **NECESSITY FOR, WITH TENDER OF PRICE, IN ORDER TO SUSTAIN ACTION FOR NON-DELIVERY OF PROPERTY.** See Sale, 1.

DEMURRER.

1. **ERROR IN OVERRULING WAIVED BY ANSWERING.** See Practice, 16.
2. **TO AMENDED PETITION, WHILE ANSWER IS ON FILE TO THE ORIGINAL PETITION.** See Practice, 18.

DEPOSITIONS.

1. **DISCREPANCY IN NAME OF NOTARY: PRESUMPTION.** The practice of using merely the initial letters of Christain names in the execution of official papers creates liability to mistake and uncertainty, and is not to be commended. And, where a commission to take depositions was issued to Fred R., and was returned executed and certified to by F. A. R., *held* that, while the court could not, without more, presume that Fred R. and F. A. R. were identical, yet, as the commission must be presumed to have been sent to Fred R., and as it was executed, returned and certified by some one who might have been Fred R., and who stated in the body of his certificate that his name was Fred A. R., the identity of the commission sufficiently appeared, and the court properly refused to suppress the deposition on account of the discrepancy. *Byington v. Moore*, 470.
2. **WRONG SEAL TO COMMISSION: AMENDMENT: PRACTICE.** Where, after a deposition had been taken and returned in a case pending in the circuit court, it was found that by mistake the seal of the district court had been affixed to the commission, and a motion to suppress was made on that account, *held* that, as the moving party could not have been prejudiced by the ruling, it was not reversible error for the court, in sustaining the motion, to order the clerk to attach the proper seal to the commission, and to return it, thus amended, together with the deposition, to the commissioner, with directions to him to require the witness to reappear before him, and, upon his reappearance, to read over to him the deposition, and to require him to subscribe and swear to the same again, and to certify the same back to the court. *Id.*
3. **MOTION TO SUPPRESS: TIME OF MAKING.** When a deposition is filed in term time, a motion to suppress, if made, must be made by the morning of the third day after the deposition is filed, and, in any case, must be made before the cause is reached for trial. *Id.*
4. **FILING NOT ENTERED IN APPEARANCE DOCKET: OBJECTION TOO LATE ON APPEAL.** Where the filing of a deposition was not entered in the appearance docket, but the deposition was read on the trial without objection on that account, and is certified to this court on appeal, it cannot be discarded here as being no part of the record. *Id.*

DISTRICT ATTORNEY.

1. **MISCONDUCT OF: JUDGMENT REVERSED ON ACCOUNT OF.** See Criminal Law, 9.

DIVORCE AND ALIMONY.

1. **DIVORCE: ADULTERY: EVIDENCE CONSIDERED.** The admissions of defendant made in the spirit of boasting, and the direct but improbable testimony of a hostile witness, considered, and *held* not sufficient to establish the charge of adultery as a ground for divorce. *Haggard v. Haggard*, 82.
2. **ALIMONY: ACTION FOR WITHOUT DIVORCE: MEANS OF PROSECUTING.** See Husband and Wife, 7.

DOGS.

1. **VICIOUS: OWNER OR BAILEE MUST RESTRAIN.** See Negligence, 1.

DOMESTIC ANIMALS.

1. THE OWNER OR BAILEE OF A VICIOUS DOG MUST RESTRAIN HIM OR PAY DAMAGES. See Negligence, 1.

DOMESTIC RELATIONS.

1. SERVICES BY MEMBER OF FAMILY: PRESUMED TO BE GRATUITOUS. Where it is shown that a person rendering services was a member of the family of the person served, and receiving support therein, either as a child, a relative or a visitor, a presumption of law arises that the services were gratuitous, and a recovery for such services cannot be had without showing an express promise to pay for them, or such facts and circumstances as will warrant the jury in finding that they were rendered in the expectation, by one of receiving, and by the other of making, compensation therefor. *Keegan v. Estate of Malone*, 208.
2. ADOPTION OF BASTARD CHILD BY ONE MARRYING THE MOTHER. See Bastardy, 1.

DOWER.

1. NOT AFFECTED BY WILL, THE TERMS OF WHICH ARE NOT ACCEPTED AS PROVIDED BY STATUTE. See Will, 11.

DURESS.

1. FACTS CONSTITUTING. See Contract, 1.
2. MORTGAGE OBTAINED BY: INNOCENT HOLDER. See Contract, 2.

EASEMENT.

1. PRIVATE WAY TO HIGHWAY: INJUNCTION TO RESTRAIN OBSTRUCTION OF. Upon consideration of all the facts in this case, (see opinion,) where plaintiff had purchased a private way from his farm to the highway, *held* that he was entitled to have the way kept open, and that defendants, the owners of the adjoining lands, should be restrained from maintaining a fence and gate across the way where it enters the highway. *Devore v. Ellis*, 505.
2. NOTICE TO PURCHASER: PRESCRIPTION. *Teeter v. Quinn*, 758.

EMINENT DOMAIN.

1. EXTENT OF RIGHT IN CASE OF RAILROADS. See Railroads, 7.
2. JURISDICTION OF SHERIFF'S JURY TO CONDEMN RIGHT OF WAY. See Railroads, 21.

EQUITY.

1. OFFER BY PLAINTIFF TO DO, IN ACTION TO REDEEM: WHAT IS SUFFICIENT. See Redemption, 2.
2. BETWEEN NEGLIGENT ASSIGNEE OF MORTGAGE AND GOOD-FAITH PURCHASER OF MORTGAGED PREMISES. See Mortgage, 3.
3. EQUITABLE ASSIGNMENT OF PARTICULAR FUND. See Assignment, 3, 4.

4. ACTION IN: PARTIES DEFENDANT. All the persons necessary to the full and final determination of the interests involved should be made parties to a suit in equity; but the rights and liabilities of such as are not made parties cannot be adjudicated. *Spurgin v. Adamson*, 661.
5. SUBROGATION: WHO ENTITLED TO: RULE STATED AND APPLIED. A person may be subrogated to the rights of a creditor, in the absence of any contract or understanding, when he is surety, and pays the debt for his own protection, or when he is a junior lien-holder, and pays the senior lien for his own protection. But, where a person is in no manner bound, and on his own motion, in the absence of a contract or expectation that he will be substituted in the place of the creditor, pays the debt, he will be regarded as an intermeddler, and not entitled to subrogation. (See authorities cited by Seevers, J.) Accordingly *held*, under the facts of this case, (see opinion,) where intervenor furnished the money to redeem from a judicial sale, that he was not entitled to subrogation to the rights of the purchaser at the sale. *Wormer & Son v. Waterloo Ag'l Works*, 699.

ESTATES OF DECEDENTS.

1. INTEREST OF SURVIVING SPOUSE NOT AFFECTED BY WILL, THE TERMS OF WHICH ARE NOT ACCEPTED AS PROVIDED BY STATUTE. See Will, 11.
2. PAYMENT FOR MONUMENT FOR DECEASED. A suitable monument may properly be erected to the memory of a deceased person, and the cost thereof paid by the administrator out of the funds of the estate. *Lutz v. Gates*, 513.
3. COLLECTION OF JUDGMENT AGAINST DECEDENT: STATUTE OF LIMITATIONS. Where a judgment has been rendered against a decedent in his lifetime, which the personal estate is insufficient to pay, an action may be commenced to enforce the payment of the judgment by the sale of the real estate. Code, § 3092. But collection must first be sought out of the personal estate; and, for the purpose of such collection, the judgment must be clearly "stated, sworn to and filed," as a claim against the estate, the same as any other claim. If filed as a claim of the fourth class, and not approved and allowed by the administrator, it must be proved, on notice to the administrator, before the court, within twelve months of the giving of notice of the appointment and qualification of the administrator. Plaintiff's claim in this case, founded on such a judgment, not having been proved within the twelve months, *held* barred by the statute of limitations. *Bayless v. Powers*, 601.
4. PAYMENT TO WIDOW OF DECEDENT NO SATISFACTION. A railway company cannot satisfy the estate of an employe, killed through its negligence, by settlement with and payment to his widow—she not being the administratrix of his estate. *Dowell v. B., C. R. & N. R'y Co.*, 629.

ESTOPPEL.

1. OF CLAIMANT OF PROPERTY LEVIED UPON: FACTS NOT CONSTITUTING. See Execution, 2.
2. TO DENY JURISDICTION OF COURT. See Practice, 15.
3. OF COUNTY TO DENY SETTLEMENT OF PAUPERS: FACTS NOT CONSTITUTING. See Paupers, 2.
4. OF OWNER OF HOMESTEAD TO OBJECT TO SALE OF WITHOUT PLATTING. See Homestead, 4.

5. OF AGENT IN SALE OF LAND FROM ASSERTING TITLE AS AGAINST ONE TO WHOM HE NEGOTIATED A SALE BY SUPPRESSING THE TRUTH. See Fraud, 9.

EVIDENCE.

1. IN RIGHT OF WAY CASES: PRACTICE. See Railroads, 3-6.
2. INJURY ON SIDEWALK: FACTS, NOT OPINIONS. In an action based on injuries caused by a defective sidewalk, it was not competent for witnesses for defendant to testify that plaintiff limped when she was observed, but did not limp when she was not observed, because whether she was observed or not must have been a matter of opinion. The witnesses were properly confined to a statement of facts as seen by them. For a like reason, it was not competent for a witness to state whether or not the walk was ordinarily good or not. *Hollenbeck v. The City of Marshalltown*, 21.
3. ORAL TO PROVE PUBLICATION OF TOWN ORDINANCE. See Cities and Towns, 5.
4. ON TRIAL BEFORE REFEREE: PRESERVATION OF. See Practice, 3.
5. TO ESTABLISH AN *alibi*. See Criminal Law, 3, 21.
6. OF FRAUDULENT CONVEYANCE: INADEQUACY OF PRICE. See Fraudulent Conveyance, 1, 2, 10.
7. IN ACTION TO RECOVER PERSONAL PROPERTY ALLEGED TO BE HELD UNDER FRAUDULENT TITLE. See Fraudulent Conveyance, 3, 7.
8. OF INDEPENDENT TRANSACTION TO ESTABLISH FRAUD. See Fraudulent Conveyance, 6.
9. ACTION FOR SERVICES. Where one sued for certain services alleged to have been rendered to defendant, and a general denial was pleaded, it was error to exclude as evidence an award and judgment thereon rendered in favor of plaintiff and against a third person on account of the same services. The offered testimony tended to show that the services were not rendered to defendant. *De Forrest v. Butler*, 78.
10. ADULTERY: ADMISSIONS TO ESTABLISH. See Divorce and Alimony, 1.
11. BOND OF SCHOOL DISTRICT: SIGNATURE NOT DENIED UNDER OATH. Where an action was upon a bond purporting to have been issued by a school district, and the signature of the secretary of the district upon the bond was shown to be genuine, and the answer, though denying specifically the allegations of the petition, was not under oath, *held* that there was no error in admitting the bond in evidence. *Curry v. Dist. Twp. of Sioux City*, 102.
12. LETTERS: INTERPRETATION OF LEFT TO JURY. See Law and Fact, 1.
13. ATTORNEY AND CLIENT: CONFIDENTIAL COMMUNICATIONS. An attorney may testify against a client in regard to a matter with which he was in no way professionally connected, and as to which he did not obtain his knowledge through his professional relations with his client. *Reinhart v. Johnson*, 155.
14. TAX RECORDS: PRESUMPTION OF REGULARITY IN. Where a personal property tax appears on the tax-list of a certain township, it will be presumed, in the absence of any showing to the contrary, to have been placed there at the proper time and by lawful authority. *Silcott v. McCarty*, 161.

15. TO ESTABLISH INSANITY OF TESTATOR: BURDEN OF PROOF. See Will, 9.
16. "STUB" OF REDEMPTION CERTIFICATE: EX PARTE ENTRY THEREON. The "stub" of a redemption certificate kept in the county auditor's office is a "record" belonging to that office, and is, by section 905 of the Code, made evidence of the matters which appear therein; but an entry thereon purporting to cancel the redemption, because inadvertently allowed by the auditor after the time therefor had expired, cannot bind the redemptioner, without his acquiescence. *Ellsworth v. Low, Adams & French et al.*, 178.
17. SECONDARY SUFFICIENT WHEN NOT OBJECTED TO. A fact may be established by secondary evidence when no objection is made, and the best evidence is not demanded. *Id.*
18. ON APPEAL FROM AWARD OF RIGHT OF WAY JURY. See Railroads, 11.
19. TO ESTABLISH FRAUD IN CONVEYANCE: DECIDED PREPONDERANCE REQUIRED. See Fraudulent Conveyance, 8.
20. OF PERSONAL TRANSACTION WITH A DECEDENT AS AGAINST HIS ASSIGNEE. A widow, in an action to set aside a deed made by her husband to the defendant, may not testify to a personal communication between herself and her husband affecting the merits of the action. *Palmer v. Palmer*, 204.
21. PAROL TO EXPLAIN OR VARY WRITING. Where plaintiff had made to defendant a bill of sale of certain goods, the testimony of plaintiff, that defendant agreed to apply the proceeds of the goods to pay plaintiff's debts, was not incompetent as contradicting, altering or explaining the bill of sale. *Ewaldt v. Farlow*, 212.
22. BREACH OF CONTRACT: IRRELEVANT MATTER. Where plaintiff sought to recover damages for the violation of defendants' contract, under which land had been deeded to plaintiff's wife, evidence that the land had been encumbered since the conveyance was wholly immaterial to the issues. *Id.*
23. GOOD FAITH; OPINION OF ATTORNEY. The testimony of an attorney who drew a bill of sale, to the effect that he regarded the transaction as an honest one, was not admissible on the question of the *bona fides* of the conveyance—that being the ultimate question for the jury. *Sweet v. Wright*, 215.
24. IN ACTION FOR REPLEVIN FOR CORN PURCHASED UNDER A CONTRACT: CONFLICTING TITLES. See Replevin, 4.
25. CONTRACT SIGNED BY ONE PARTY ONLY IS ADMISSIBLE. See Contract, 6.
26. INTRODUCTION OF SECONDARY BEFORE FOUNDATION LAID: ERROR CURED. See Practice, 8.
27. SECONDARY TO ESTABLISH EXECUTION AND TERMS OF CONTRACT. See Contract, 8.
28. OF MEANING OF TERMS PECULIAR TO THE TRADE AS USED IN CONTRACT. See Contract, 11.
29. TO ESTABLISH ALTERATION OF NOTE: BURDEN OF PROOF. See Promissory Note, 2.
30. OF FACTS NOT SPECIALLY PLEADED. See Chattel Mortgage, 1.
31. BREACH OF WARRANTY: DECLARATIONS OF PERSON IN POSSESSION. In an action for a breach of warranty in the conveyance or real estate, the

declarations of the person in possession, as to the right by which he holds possession, are admissible in evidence as a part of the *res gestae*. *Wilson v. Irish*, 260.

32. **HANDWRITING: STANDARD OF COMPARISON.** Where the evidence of the genuineness of a letter was meager and unsatisfactory, it was error to admit it in evidence as a standard of comparison whereby the jury should determine the genuineness of another letter alleged to have been written by the same person. *Id.*
33. **CONVERSATION IN PRESENCE OF ANOTHER: QUESTION FOR JURY.** Where a conversation occurred in the presence of a party, it was not for the witness or the court, but for the jury, to determine, from all the circumstances, whether the party heard the conversation or not. *Id.*
34. **CONVERSATION BETWEEN PARTIES: QUESTION FOR JURY.** Where a remark made by defendant to plaintiff was material, if made *before* the delivery of a deed, but the evidence was conflicting as to whether it was made before or after, the evidence concerning the remark should all have gone to the jury, and it was for the jury to determine whether it was made before or after the delivery. *Id.*
35. **BREACH OF WARRANTY: BURDEN OF PROOF.** In an action for a breach of warranty in a conveyance of land, where the breach complained of was a prior conveyance to another, the burden of proof to establish such prior conveyance was upon the plaintiff. *Id.*
36. **IN ACTION BY WIFE AGAINST SALOON-KEEPER FOR SALE OF LIQUOR TO HUSBAND.** See *Intoxicating Liquors*, 2, 3.
37. **EXPERT TESTIMONY: ESTABLISHMENT OF NEGLIGENCE BY.** Where the failure to have certain work done at a certain time is the negligence complained of, it is not competent to ask a witness as an expert when the work should be done. The witness should state the results accruing from delay in having the work done, and the jury should determine whether or not the delay shown in the case on trial constituted negligence. *Kitteringham v. Sioux City & Pacific R'y Co.*, 285.
38. **OF CUSTOM IN REPAIRING CARS, AS BEARING ON QUESTION OF NEGLIGENCE.** See *Railroads*, 12.
39. **LETTERS: RULE OF STATUTE.** When a letter written to defendant was introduced, his reply thereto was admissible, under section 3650 of the Code. *B., C. R. & N. R'y Co. v. Sherwood*, 309.
40. **UNAUTHORIZED ACTS AND DECLARATIONS.** Evidence of the acts and declarations of a party not first shown to have been authorized to act and speak for the plaintiff cannot be admitted against him. *Parsons v. Thomas*, 319.
41. **OBJECTIONS TO, NOT MADE IN TRIAL COURT, NOT CONSIDERED ON APPEAL.** See *Practice in Supreme Court*, 18, 19, 29.
42. **IN ACTION ON ATTACHMENT BOND: LOSS OF CREDIT.** See *Attachment*, 2.
43. **MUST BE APPLICABLE TO ISSUES.** Evidence tending to establish a counter-claim not pleaded is not admissible. *Mitchell v. Harcourt*, 349.
44. **TENDER: ADMISSION OF AMOUNT DUE.** See *Attachment*, 3.
45. **GROUND FOR ATTACHMENT: EMBARRASSED CONDITION OF DEFENDANT.** See *Attachment*, 4.

46. **IDENTIFICATION OF AN APPEAL.** See Bill of Exceptions, 4; Practice in Supreme Court, 25.
47. **CREDIBILITY OF WITNESS AS AFFECTED BY INTOXICATION.** While the intoxication of a witness at the time of the transactions of which he testifies does not destroy his credibility, it undoubtedly impairs it; but if his testimony is corroborated, or his recollection of the transaction appears to be distinct and clear, he is entitled to belief. *State v. Castello*, 404.
48. **ADMISSION OF ERROR WITHOUT PREJUDICE.** The admission of irrelevant evidence is no ground for reversal, where it clearly appears that the appellant could not have been prejudiced thereby. *Carson v. German Ins. Co.*, 433.
49. **ADMISSIBILITY OF FALSE REPRESENTATIONS MADE TO THIRD PARTIES.** In an action based upon alleged false representations made by defendants to plaintiff, whereby plaintiff was induced to enter into a contract of agency to his damage, evidence that defendants had made similar representations to others, with whom they were seeking to make similar contracts of agency, was admissible to corroborate the testimony of plaintiff as to the representations made to him. *Porter v. Stone*, 442.
50. **FALSE REPRESENTATIONS: MATERIALITY OF.** Where defendants, in order to induce plaintiff to become their agent for the sale of fence posts, falsely represented that the posts were manufactured at more than one place, such representation tended to create the belief that the posts were in demand, and evidence of such representation was material in an action based upon false representations. *Id.*
51. — : — : **CONTRADICTION OF WRITTEN RECEIPT.** Where, in pursuance of a contract, certain notes were given by plaintiff to defendants, and their receipt taken therefor, in an action by plaintiff against defendants, based upon alleged false representations, whereby plaintiff was induced to enter into the contract, *held* that plaintiff might prove that the defendants falsely represented that the notes were to be held as collateral security—such evidence being offered to establish the charge of false representations, and not to contradict the receipt. *Id.*
52. — : **RELEVANCY OF.** Where defendants, in order to induce plaintiff to enter into a contract of agency for the sale of certain articles, agreed to furnish the articles to him at a given price, such agreement was a representation that they could be furnished at that price, and defendants' subsequent refusal to furnish them at that price tended to show that the representation was false; and evidence of such refusal was, therefore, admissible in an action against defendants based upon false representations leading to the contract. *Id.*
53. **ON APPEAL: INSUFFICIENT CERTIFICATE OF JUDGE.** See Practice in Supreme Court, 27.
54. **OF REDUNDANT ALLEGATIONS.** A plaintiff is never required to prove more of the allegations of his petition than are required to enable him to recover, and, where allegations which might have been material become redundant as the case progresses, they need not be proved. *Maichen v. Clay*, 452.
55. **LETTERS: SECONDARY: ERROR CURED.** Error in admitting secondary evidence of the contents of letters is cured by the subsequent introduction of the letters themselves. *Byington v. Moore*, 470.
56. **OFFERED AFTER SUBMISSION OF CAUSE: PRACTICE.** Where a cause was submitted as a finality upon all points but one, which was reserved

for further evidence, and a decree was entered accordingly, *held* that upon the further hearing evidence upon a point already submitted was properly excluded. *Id.*

57. **WITNESS SHOULD STATE FACTS, NOT OPINIONS.** The opinions of a witness as to whether or not, when a train of cars was in motion, a person could go between the cars and uncouple them, and at the same time see whether a frog in the track was blocked, must have been a conclusion drawn from a complication of circumstances, and should not have been admitted in evidence in this case. The witness should have been asked for the facts. It was for the jury to draw their own conclusions from them. *Coates v. B., C. R. & N. R'y Co.*, 496.
58. **LIFE TABLES TO ESTABLISH EXPECTANCY OF PERSON KILLED BY NEGLIGENCE.** See Railroads, 23.
59. **THE RETURN UPON A WRIT OF ATTACHMENT IS THE STATUTORY EVIDENCE OF WHAT THE OFFICER DID UNDER IT.** See Attachment, 5.
60. **RELIGIOUS BELIEF OF WITNESS.** A witness cannot be required to testify to his want of belief in any religious tenet, nor to divulge his opinions upon matters of religious faith. *Searcy v. Miller*, 57 Iowa, 613, followed. *Dedric v. Hopson*, 562.
61. **THE WORD "INCOMPETENT": MEANING AND USE OF.** The word "incompetent" is used to express the thought that certain evidence cannot lawfully be received, or that a witness cannot lawfully testify. It may properly be used to express the idea that a witness cannot be required to testify to certain facts, as, for example, to his religious belief; and in this case, where a witness was asked so to testify, the proceeding was properly objected to as "incompetent under the law," and the objection so stated should have been sustained. *Id.*
62. **RELIGIOUS BELIEF OF WITNESS: HIS IMMUNITY NOT WAIVED.** A witness does not waive his immunity from testifying to his religious tenets by voluntarily testifying to a part of them; and in this case, because defendant voluntarily testified to his belief in the existence of God, he did not waive his right to refuse to testify to his belief as to a conscious future state. *Id.*
63. **MEANING OF ECCLESIASTICAL TERMS: TESTIMONY OF BISHOP.** The testimony of a bishop of the Protestant Episcopal church is competent to define the meaning of the terms "parish" and "rector," as used in said church. *Bird v. St. Mark's Church*, 567.
64. **FACTS OR OPINIONS: EXCLUSION OF MUST BE JUSTIFIED BY OBJECTIONS STATED.** The testimony of the bishop of the Protestant Episcopal diocese of Iowa as to the organization of the defendant parish, and its admission into union with the diocesan convention, was not the expression of an opinion, but the statement by a competent witness of facts, which were relevant and material to the issues in this case; and, though the testimony may have been vulnerable to the objection that it was secondary, it was error to exclude it on the ground—the only one urged—that it was "incompetent, immaterial, and the statement of an opinion." *Id.*
65. **NEGLIGENCE: SETTING OUT FIRE BY ENGINE IS PRIMA FACIE EVIDENCE OF.** See Railroads, 28.
66. —: **MAY BE ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE.** See Railroads, 29.
67. —: **INFERENCE OF FROM LIKE CIRCUMSTANCES: FACTS NOT WARRANTING.** See Railroads, 30.

- 68. ———: CONFLICT OF TESTIMONY: WHAT CONSTITUTES. See Railroads, 31.
- 69. OF LEVY OF TAX BY CITY COUNCIL. See Tax Sale and Deed, 7, 8.
- 70. SECONDARY SUFFICIENT WHERE PRIMARY IS NOT DEMANDED. See Tax Sale and Deed, 9.
- 71. BANK CHECKS: PAROL TO EXPLAIN WORDS OF LIMITATION. Where checks were drawn "to be paid as soon as we settle with the county," it was competent, for the interpretation of these words, to show by parol that it was understood by the drawers, drawee and payees that the checks were to be paid out of a particular fund due the drawers from the county, and which the drawers had previously assigned to the drawee of the checks as security for advances. *County of Des Moines v. Hinkley*, 637.
- 72. ADMISSION OF: ERROR WITHOUT PREJUDICE. Error in admitting evidence to establish a fact fully established by other evidence can work no prejudice, and is no ground for reversal. *Wallace v. Wallace*, 651.
- 73. ———: THE BEST MUST BE PRODUCED. The fact that plaintiff's husband had a written lease for certain land is best proved by the production of the lease itself, and the admission of oral testimony to prove that fact, without laying a foundation therefor, was error. *Id.*
- 74. OF CONSIDERATION: MATERIALITY. Where defendant claimed to be the owner of property which formerly belonged to plaintiff's husband, evidence of consideration passing from defendant to plaintiff's husband was material, and should have been admitted. *Id.*
- 75. CROSS-EXAMINATION. Where plaintiff testified that she owned certain land, it was proper on cross-examination, for the purpose of testing the accuracy and truthfulness of her statements, to require her to state how she became such owner. *Id.*
- 76. POSSESSION AS EVIDENCE OF OWNERSHIP. One who has possession of personal property is *prima facie* the owner thereof, and he who seeks to establish ownership in another has the burden of proof. *Id.*
- 77. PRACTICE: CONTRADICTING ONE'S OWN WITNESS. A party is never precluded from introducing other evidence contradicting the statements of his own witness. And so, where plaintiffs introduced defendant's answer as evidence on their behalf, they were not bound by the denials therein contained, but could show by other evidence that the things denied were true. *Iselin v. Griffith*, 663.
- 78. PAROL TO SHOW A BILL OF SALE TO BE IN FACT A MORTGAGE. See Bill of Sale, 1.
- 79. CROSS-EXAMINATION CONTROLLED BY DISCRETION OF COURT. See Practice, 26.
- 80. AGREED STATEMENT OF FACTS TAKES THE PLACE OF DEPOSITIONS OR ORAL TESTIMONY REDUCED TO WRITING IN AN EQUITY CASE. See Practice in Supreme Court, 43.
- 81. AS TO THE BURDEN OF PROOF IN VARIOUS CASES. See Burden of Proof.
- 82. BY DEPOSITIONS. See Depositions.
- 83. IN CRIMINAL CASES. See Criminal Law, 3, 10-13, 22-26.
- 84. IN PROBATE OF WILLS. See Will, 4-9.

EXCEPTIONS.

1. **TAKEN TOO LATE TO BE CONSIDERED.** Exceptions to a decision must be taken at the time it is made, (Code, § 2831,) except in the case of instructions to the jury, which may be excepted to within three days after the verdict. Code, § 2789. Exceptions not taken in time will not be considered on appeal. *Nagel v. Guittar*, 510.

See BILL OF EXCEPTIONS.

EXECUTION.

1. **NOTICE TO SHERIFF OF OWNERSHIP: STATUTE CONSTRUED.** Section 3055 of the Code applies to persons other than the execution defendant, and does not require him to notify the sheriff that property levied upon belongs to him, before he can maintain an action to recover the property as being exempt from execution. *Parsons v. Thomas*, 319.
2. **ESTOPPEL OF CLAIMANT NOT RESISTING LEVY.** Where one, some time prior to the levy of an execution, disclaimed any interest in the property levied on, and, at the time of the levy, without consenting thereto, simply pointed out to the officer the particular property for which he was looking, held that by these acts he was not estopped from setting up as against the officer his title to the property, acquired subsequent to his disclaimer. *Davidson v. Dwyer*, 332.
3. **NOTICE OF CLAIM BY THIRD PARTY: INDEMNIFYING BOND.** Where an officer held several executions in favor of several plaintiffs, but against the same defendant, which he levied upon certain property as the property of such defendant, but the plaintiff herein claimed to be the owner of the property, and gave to the officer the notice prescribed by section 3055 of the Code, but gave only *one* notice, which was, however, made applicable to all the executions; and the execution creditors thereupon joined in *one* indemnifying bond; (Code, § 3056;) held that the one notice and the one indemnifying bond were a sufficient compliance with the statute, and that a separate notice and bond for each execution was not necessary. *Baxter v. Ray*, 336.
4. **ACTION ON INDEMNIFYING BOND: ESTOPPEL: JOINDER OF PARTIES AND CAUSES.** In such case, the execution plaintiffs who executed the indemnifying bond, and who, upon the security thus given, procured the property of the claimant to be sold, were estopped from insisting that the notice and bond were not a compliance with the statute; and, being all bound together, they could not claim that they were improperly joined as defendants in an action brought upon the bond by the claimant of the property, nor that there was a misjoinder of causes. *Id.*
5. **EXEMPTION OF DAMAGES FOR RIGHT OF WAY OVER HOMESTEAD.** Money due from a railroad company, or from the sheriff, after it has been paid to him by the company, as damages assessed by a sheriff's jury for right of way over a homestead, is exempt from execution, notwithstanding the character of the homestead as such is not destroyed by the easement. *Kaiser v. Seaton*, 463.
6. **LEVY: NOTICE OF OWNERSHIP BY THIRD PARTY: INDEMNIFYING BOND: REPLEVIN OF PROPERTY: DUTY OF SHERIFF.** The defendant, as sheriff, levied an execution upon certain cattle as the property of O. J. M., the execution defendant, and placed the cattle in the care of C. A. M., wife of O. J. M., taking her receipt therefor, and advertised the property for sale. Afterwards C. A. M. notified the sheriff in writing that she, and not her husband, was the owner of the cattle, whereupon the sheriff demanded and received of the execution plaintiff an indemnifying bond. After this C.

A. M. replevied the cattle from the sheriff, and he made return of the execution, showing the levy, the advertisement, and the replevin of the cattle. The replevin suit was decided adversely to C. A. M., on the ground that she was in possession of the property when the suit was begun, but the ownership of the property was not adjudicated. Held—*First*, that it was error for the sheriff to return the writ until after the termination of the replevin suit; *Second*, that the execution, though so returned, was not dead, the indorsement made thereon not being properly a return, because it showed that the property levied upon had not been disposed of. *Third*, that, after the adjudication of the replevin suit, it was the duty of the sheriff to withdraw the execution from the clerk's office, and thereunder to take the property from C. A. M. and sell it; and for his failure to do so, or to otherwise make whole the execution plaintiff, he was liable to the latter upon his official bond. *Cox v. Currier*, 551.

7. **LIFE OF: SALE AFTER SEVENTY DAYS ON LEVY MADE BEFORE.** Although it is provided by statute (Code, § 3037) that an execution shall be returned on or before the seventieth day after its delivery to the officer, yet where a levy has been made before the expiration of that time, a sale after the expiration of the seventieth day is valid; and in such case an *alias* is not necessary. *Butterfield v. Walsh*, 21 Iowa, 97, and *Stein v. Chambliss*, 18 Id., 474, followed. *Id.*

EXEMPTION.

1. **RECOVERY OF EXEMPT PROPERTY LEVIED UPON: NOTICE TO SHERIFF.** See Execution, 1.
2. **FROM TAXATION: RIGHT OF LEGISLATURE TO TAKE AWAY.** See Taxation, 1.
3. **FROM EXECUTION: OF COMPENSATION FOR RIGHT OF WAY OVER HOME-STEAD.** See Execution, 5.

FALSE REPRESENTATION.

1. **AS TO ANOTHER'S RESPONSIBILITY: LIABILITY OF MAKER AS AFFECTED BY HIS KNOWLEDGE.** In an action for damages alleged to have been sustained by reason of the defendant's having falsely represented the financial condition of another, a recovery cannot be had, unless it is shown, not only that the representations were false, but that the defendant knew them to be false at the time they were made. It is not sufficient to show merely that defendant did not know them to be true. *Avery, Spangler & Co. v. Chapman*, 144.
2. **ACTION BASED UPON: EVIDENCE.** See Evidence, 49-52.

See FRAUD.

FORECLOSURE.

1. **OF MORTGAGE: REDEMPTION FROM BY JUNIOR LIEN-HOLDER NOT MADE PART: TERMS OF.** See Redemption, 1, 4, 5, 6, 8, 9.
2. **DECREE FIXING PRIORITY AND DISTRIBUTION OF LIENS: CONSTRUCTION OF.** In the foreclosure of several mortgages on three parcels of ground, the court entered a decree fixing the order of liens and distributing them to the several parcels, and it is *held* that under the decree (see opinion) the sheriff was authorized to sell all the land, and the court erred in setting aside the sale as to two of the parcels, upon the petition of plaintiff herein. *Kellogg v. Gutchens*, 502.

FORMER ADJUDICATION.

1. **SPECIAL VERDICT: AVOIDED BY NEW TRIAL.** Where a jury made a special finding of fact, upon which the defendant moved for judgment notwithstanding the general verdict for plaintiff, and also moved for a new trial subject to its motion for judgment, and the court overruled the motion for judgment, but granted a new trial, *held* that the order gave a new trial to both parties upon all the issues, and that the special finding of the jury did not adjudicate the fact found by them as between the parties. *Hollenbeck v. The City of Marshalltown*, 21.
2. **UPON WHOM AND HOW FAR BINDING.** An adjudication binds only the parties thereto, and binds them only as to the points adjudicated in which they are interested; and when one is made a party to a cause for one purpose only, he is not bound by the adjudication of a question involved in the cause as between other parties thereto, and in which he has no interest. *Goodnow v. Stryker*, 221.
3. **APPEARANCE OF COUNSEL IN ARGUMENT.** The fact that a party interested in a like question secures a hearing of his counsel upon the argument of a cause does not make him a party to the cause so as to make the adjudication thereof binding upon him. *Id.*
4. **FACTS CONSTITUTING.** Where an agent for the sale of machinery took from the purchaser of a certain machine three notes, payable to his principals, and, under a mistaken apprehension of his duty to his principals, he himself guaranteed the notes, an adjudication in his favor, in an action upon his guaranty of one of the notes, on the ground that his contract with his principals did not require him to guarantee the notes, and that the guaranty was made by mistake, was decisive of his liability upon all the notes, as between the same parties; and, in an action between the same parties upon the two other notes, a demurrer to an answer setting up these facts should have been overruled. *Aulman v. Mount*, 674.

FRAUD.

1. **COLLUSION TO COVER TITLE TO PERSONAL PROPERTY: EVIDENCE.** See *Fraudulent Conveyance*, 3-7.
2. **NOT DISREGARDED FOR SAKE OF PROTECTING HOMESTEAD.** Where a wife was the owner of land, including the homestead, and entrusted her whole business to her husband, and the husband made arrangements to secure a loan from plaintiff's assignor, to be secured by mortgage on the wife's land, promising that he and his wife would execute a note for the loan, and a mortgage on the land, including the homestead, to secure the note, and the papers were so executed by the husband and wife as to lead plaintiff's assignor to suppose that they were executed in accordance with the understanding, and were sent to plaintiff's assignor, who thereupon forwarded the amount of the loan to the husband, *held* that the wife could not be heard to assert that her husband had no authority to sign the note, and that neither could take advantage of erasures in the mortgage, so made as not to be easily noticeable, and the effect of which would be to release the homestead from the lien of the mortgage. *Saucy v. Perry*, 238.
3. **IN OBTAINING SIGNATURE TO NOTE.** See *Promissory Note*, 4, 5.
4. **OF ATTORNEY AS AFFECTING CLIENT.** See *Promissory Note*, 5.
5. **OF ATTORNEY: LIABILITY TO CLIENT.** See *Attorney at Law*, 3-6.
6. **BY UNDUE INFLUENCE UPON A FEEBLE MIND.** See *Contracts*, 19.

7. **IN RELEASING MORTGAGE OF RECORD AFTER ASSIGNMENT TO ANOTHER: EQUITIES BETWEEN NEGLIGENT ASSIGNEE AND GOOD-FAITH PURCHASER.** See *Mortgage*, 3.
8. **IN PROCURING CONVEYANCE: FACTS CONSTITUTING: CONVEYANCE SET ASIDE.** Where an agent, by collusion with a third person, in the name of such person writes to his principal, falsely representing that there is a defect in his title to land, and the principal advises with the agent about it, and, acting on his advice, conveys the land for less than its value to such third person, and he conveys it to the agent, and the agent to another, the title may be set aside for fraud, and all the conveyances canceled, subject to such equitable rights as may appear in the agent's grantee. *Seymour v. Shea*, 708.
9. **SALE OF LAND BY AGENT: CONCEALMENT OF ADVERSE INTEREST: AGENT CANNOT PROFIT BY: ESTOPPEL.** Where plaintiff's father was the owner of certain real estate, and had long lived apart from his wife, (who was an inmate of an insane asylum in a distant state), and had married another woman, by whom he had several children, and from whom, after many years of cohabitation, he had been divorced; and defendant, knowing the facts concerning the second pretended wife, but knowing nothing of the existence of the first and real wife, (who was also plaintiff's mother,) but believing her to be dead, was induced by plaintiff, acting as his father's agent, to purchase of his father the land in question, accepting a deed therefor in which plaintiff's mother, who was still living, did not join:—*held* that, in the absence of evidence to the contrary, the law will presume that plaintiff knew that his mother was living, and that she had an interest in the land; that his participation in the sale of the land and his concealment of his mother's interest was a fraud upon defendant, and that, after the death of his father and the subsequent death of his mother, he could not, as the heir of his mother, claim, as against the defendant, an interest in the real estate. *Williams v. Wells*, 740.

See **FALSE REPRESENTATIONS.**

FRAUDULENT CONVEYANCE.

1. **INADEQUACY OF PRICE AS EVIDENCE.** A slight inadequacy of consideration given for land is not sufficient to evince a fraudulent intent. *Rusie v. Jameson*, 52.
2. **EVIDENCE NOT ESTABLISHING.** The evidence in this case considered and *held* insufficient to prove that a conveyance from a son-in-law to his father-in-law was fraudulent. *Id.*
3. **COLLUSION TO COVER TITLE: EVIDENCE.** Where it was sought to show that the plaintiff's title to the goods in question was fraudulent, and was set up in order to defeat the creditors of the plaintiff's father, who was alleged to be the real owner, it was not competent to show that the father had attempted to put a portion of his goods beyond the reach of his creditors prior to the time when plaintiff claimed to have acquired an interest in the goods. *Hardy v. Moore*, 65.
4. ———: ———: **DECLARATIONS OF PARTY IN POSSESSION.** In such case, the declarations of the father, who was in possession of the goods, though made in the absence of the plaintiff, were material to show in what capacity he was in possession, whether in his own right or as clerk for plaintiff. *Id.*
5. ———: ———. In such case, also, judgments against the father were properly admitted in evidence for the purpose of showing that he was

in debt, there being some evidence to show that the plaintiff knew of such indebtedness, at the time when he claimed to have acquired an interest in the property. *Id.*

6. ———: EVIDENCE OF INDEPENDENT TRANSACTION. Where two transactions are claimed to be fraudulent, only one of which, however, is controverted, it must be shown that they are so connected as to evince a common purpose, before the uncontroverted transaction can be admitted in evidence for the purpose of establishing the other to be fraudulent. Much less, in such case, can an uncontroverted transaction, which is not shown to be fraudulent, and which was too remote in time to raise any presumption of its being connected in purpose with the other, be admitted in evidence. *Id.*
7. ———: BURDEN OF PROOF: INSTRUCTION. In an action to recover personal property, where the defense was that plaintiff's title was fraudulent, before the burden of proof to show the fraud was cast upon defendant, it was necessary for the plaintiff to show title in himself, and the court in this case properly so instructed. *Id.*
8. EVIDENCE TO ESTABLISH. A conveyance of land, executed and acknowledged in due form, will not be set aside for fraud without a decided preponderance of the evidence establishing the fraud; and the alleged fraud in this case is not so established. *Palmer v. Palmer*, 204.
9. RESCISSION: EFFECT OF. Where property is transferred with a fraudulent intent, but is afterwards transferred back again before the intent is consummated, no rights are lost or acquired by the transaction. *Davidson v. Dwyer*, 332.
10. FROM MOTHER TO SONS: EVIDENCE ESTABLISHING. The evidence in this case considered, and *held* to justify the trial court in decreeing that a conveyance of land by a mother to her sons should be set aside as being in fraud of her creditors. *Johnston Harvester Co. v. Cibula*, 697.

GARNISHMENT.

1. NOTICE TO GARNISHEE OF TIME AND PLACE OF ANSWERING. Where a commissioner is appointed to take the answer of a garnishee, and the court does not fix the time and place when and where his answer is to be taken, the commissioner should fix such time and place, and give the garnishee notice thereof. *Thomas v. Hoffman*, 125.
2. ———: JUDGMENT WITHOUT NOTICE INVALID. In such case, where the garnishee had no notice of the time and place when and where his answer was to be taken, and the commissioner reported that he had failed to appear and answer, and the plaintiff thereupon moved for judgment against him, and the court rendered judgment accordingly, *held* that such judgment was invalid, and that the court below erred in overruling a motion to vacate the judgment, and in dissolving an injunction issued to enjoin the collection of the judgment by execution. *Id.*
3. JUDGMENT WITHOUT NOTICE: MOTION TO VACATE: WHEN MADE. A motion to vacate a judgment rendered against a garnishee for failure to answer, when he had no notice of the time and place when and where his answer was to be taken, might be made after the term at which the judgment was rendered. *Id.*
4. APPEARANCE IN COURT: CORPORATION AGGREGATE. The provisions of sections 2979, 2980 of the Code, requiring a garnishee to appear in court and answer interrogatories, cannot, in the nature of things, apply to a

corporation aggregate; and it is competent for such corporation to answer in writing through some officer or agent authorized to do so, and cognizant of the facts. *Bailey v. U. P. R'y Co.*, 354.

5. **LIABILITY OF GARNISHEE ON ACCOUNT PREVIOUSLY ASSIGNED BY THE DEFENDANT.** A garnishee cannot be held liable on an account owing to the principal defendant, when the account was assigned, and the garnishee had notice of the assignment, at the time of the service of the garnishment. *Id.*
6. **OF RAILROAD COMPANY: LIABILITY FOR ADDITIONAL SUM DUE PRINCIPAL DEBTOR FOR RIGHT OF WAY ON APPEAL FROM AWARD OF SHERIFF'S JURY.** See Railroads, 26.
7. **WHAT IS STATUTORY EVIDENCE OF.** See Attachment, 5.
8. **COUNTY EXEMPT FROM: WAIVER OF EXEMPTION.** A county is exempt from garnishment process; (Code, § 2979;) and it is doubtful whether it waives such exemption by bringing an action in relation to the garnished fund, and making the garnishors parties thereto. *County of Des Moines v. Hinkley*, 637.
9. **OF FUND IN CUSTODY BUT NOT IN POSSESSION.** One who has the equitable right to the custody of a fund, but not the actual possession thereof, may be garnished in relation thereto for the debt of those who are the equitable owners of the fund; and such garnishment will create a lien upon the fund senior to that created by checks subsequently drawn thereon by the equitable owners. *Id.*

GOVERNMENT LANDS.

1. **DES MOINES RIVER GRANT: LANDS ABOVE THE RACCOON FORK: TITLE BY PRE-EMPTION.** Under the various resolutions and acts of congress, instructions of the commissioner of the general land office, and judicial decisions, referred to in the opinion, the lands in the odd numbered sections above the Raccoon Fork of the Des Moines river, at one time supposed to be included in the Des Moines river grant, *held* not to have been subject to pre-emption in May, 1862, and that the title of plaintiffs to the lands in controversy, being based upon such pre-emption, could not be sustained. *Bullard v. Des Moines & Ft. Dodge R'y Co.*, 362.

HIGHWAY.

1. **DEDICATION: FACTS CONSTITUTING.** Where a road supervisor, in opening a road, at the request of a land-owner deflected slightly from the line of the road as established, and the road thus laid out and opened was worked and traveled for fourteen years, *held* that there was a dedication on the part of the land-owner, and that the public acquired a right to have the road kept free from obstructions erected therein by him. *Ryan v. Kennedy*, 37.

HOMESTEAD.

1. **MORTGAGE OF ENFORCED AGAINST HUSBAND AND WIFE UNDER PECULIAR STATE OF FACTS.** See Fraud, 2.
2. **MORTGAGE OF, WITH OTHER LANDS: ORDER OF SALE ON FORECLOSURE: STATUTE CONSTRUED.** Where real estate, including the homestead, is mortgaged to A., and afterwards the same real estate, except the homestead, is mortgaged to B., upon the foreclosure of the first mortgage, B.

cannot insist that the homestead be first sold to satisfy A's claim, but the mortgagor may insist that the property, other than the homestead, included in A's mortgage be first exhausted, before the homestead is exposed to sale thereunder. Code, § 1993. *Dilger v. Palmer*, 60 Iowa, 117, distinguished. *Equitable Life Ins. Co. v. Gleason*, 277.

3. COMPENSATION FOR RIGHT OF WAY OVER: EXEMPTION OF. See Execution, 5.
4. SALE OF ON EXECUTION, WITHOUT PLATTING, VOID: ESTOPPEL OF OWNERS. Where an officer holds an execution against a homestead and other lands, and the occupants have failed to select and plat the homestead, it is the duty of the officer to select and plat the same, as provided by section 1998 of the Code, and to exhaust the other property liable to sale before offering the homestead; and a failure so to do on his part will render the sale void. In such case, the owners are not estopped from maintaining an action to set aside the sale, on the ground that they had notice of the sale, and raised no objection thereto at the time. As the execution itself gave notice to the officer that there were other lands liable, besides the homestead, the owner had a right to rely upon his doing his duty without notice or request from them. But the rule is otherwise where the officer cannot be charged with notice of other property, unless the same is pointed out by the execution defendants. See *Foley v. Cooper*, 43 Iowa, 376. *Owens v. Hart*, 620.
5. AN ORDINARY JUDGMENT CREDITOR HAS NO RIGHT TO REDEEM A HOMESTEAD FROM A MORTGAGE FORECLOSURE SALE. See Redemption, 7.

HUSBAND AND WIFE.

1. AGENCY OF WIFE WHEN ABANDONED. Where a wife was abandoned by her husband, with five small children to support, and with but little money and means of subsistence *held*, (1) that she had authority at common law to sell a cow left by the husband, which was vicious, and of no use in supporting the family, for the purpose of procuring family supplies; (2) that the title to the cow conveyed by such sale could not be disputed by an attaching creditor of the husband, even though the husband intended that the cow should be given to such creditor to pay his debt; (3) that the wife was not required to delay the sale of the cow until her stock of money and provisions was exhausted; (4) that section 2207 of the Code was not designed to affect the wife's agency at common law. *Rawson & Rice v. Spangler*, 59.
2. WIFE BOUND BY ACTS OF HUSBAND AS HER AGENT. See Fraud, 2.
3. AGENCY BETWEEN: DEGREE OF EVIDENCE TO ESTABLISH. The marital relation alone raises no presumption of agency between husband and wife, but the existence of this relation may aid or impair the significance of other evidence tending to show agency. It is accordingly *held*, in this case, where it was sought to establish the agency of the husband as against the wife in the matter of shipping household goods used and enjoyed by them jointly, that slight evidence of the wife's authority was sufficient. *Furman v. C., R. I. & P. R'y Co.*, 395.
4. —: FACTS TENDING TO ESTABLISH. Where a husband had in his possession the defendant's receipt or bill of lading for certain household goods, used and enjoyed by himself and wife jointly, and exhibited it to defendant's agents, and on the strength thereof gave directions for the reshipment of the goods. *held* that these facts, unless otherwise explained or accounted for by the husband, were entitled to consideration as tending to prove the husband's authority to act for his wife in the premises. *Id.*

5. ———: NOTICE TO AGENT BINDS PRINCIPAL. Where the husband, as agent for the wife, attended alone to the shipment of certain household goods owned by the wife, and the goods, after delivery to the defendant for shipment, were seized upon a writ of attachment against the goods of the husband, *held* that notice of the seizure, given by the defendant to the husband, was notice to the wife. *Id.*
6. ———: PRESUMPTION FROM CONDUCT. Where the husband alone attended to the shipment of household goods belonging to the wife, and the wife was not present, and took no part in the transaction, the defendant, to whom the goods were delivered for shipment, was warranted in considering the husband as the wife's duly authorized agent, unless notified to the contrary. *Id.*
7. ACTION FOR ALIMONY ALONE: MEANS OF PROSECUTION. Where the wife is separated from the husband on account of conduct on his part justifying such separation, a court of equity will entertain an action by the wife against the husband for alimony, though no divorce or other relief is sought; (*Graves v. Graves*, 38 Iowa, 310;) and in such case the court will require the husband to furnish the wife the means of prosecuting such action. This decision is grounded upon well settled principles of equity and considerations of public policy, and not upon any statutory provision. *Finn v. Finn*, 482.

INDICTMENT.

1. FOR PERJURY: ALLEGATION OF TIME: MATERIALITY OF. See Criminal Law, 5.
2. FOR ROBBERY: SUFFICIENCY OF. See Criminal Law, 6.

INJUNCTION.

1. TO RESTRAIN WASTE: EVIDENCE OF TITLE AND POSSESSION. An injunction asked by plaintiffs to restrain defendant from cutting timber from certain land was properly refused, where plaintiffs failed to show that the title of the land was in them, or that they were in possession thereof. *Wearin v. Munson*, 466.
2. TO RESTRAIN THE OBSTRUCTION OF A PRIVATE WAY. See Easement, 1.
3. DISSOLUTION ON MOTION: WHEN NOT GRANTED. Where a preliminary injunction has been granted upon the allegations of the petition, it will not be dissolved upon the filing of an answer which sets up matter in avoidance of the petition, but the cause will be continued to the hearing, to the end that the evidence of both parties may be heard. *Huskins v. McElroy*, 508.
4. TO RESTRAIN BREACH OF CONTRACT: FACTS NOT WARRANTING. Where defendant sold to plaintiff his business and the good will thereof, and entered into a bond in the penalty of \$100 not to engage in the same business at the same place, *held* that the \$100 was in the nature of stipulated damages for the breach of the bond; that defendant incurred the whole penalty by a single breach; that plaintiff's remedy was exhausted upon the receiving of that amount, and that he was not entitled to an injunction, under § 3386 of the Code, to restrain a continuation of the breach of the contract, notwithstanding defendant was insolvent, so that the penalty of the bond could not be made of him. *Stafford v. Shortreed*, 524.
5. TO RESTRAIN NUISANCE: JOINDER OF PLAINTIFFS: JURISDICTION: EXTENT OF RELIEF. See Nuisance, 3, 4-6.

6. **DAMAGES ON BOND: ATTORNEY'S FEES TO DEFENDANT.** It may be regarded as the settled rule of this state that an attorney's fee is allowable to the defendant where an injunction is dissolved upon motion, or where it is dissolved upon the final hearing, when the injunction is the only relief sought; but, where a motion is made to dissolve an injunction as a whole, and not merely for a modification of it, where a modification is all that the defendant is entitled to, and all that he secures, he cannot, in an action on the injunction bond, recover all the fees paid his attorney for services in relation to such motion. Whether a part of such fees could be recovered is a question not arising in this case. *Ford v. Loomis*, 586.
7. ———: **FACTS NOT WARRANTING.** Where the injunction defendant, anticipating an injunction, made extraordinary efforts and accomplished the object sought to be enjoined before the writ was served, he cannot claim that he was delayed by the injunction, and recover damages for such delay. *Id.*

INSANE.

1. **ACTION AGAINST COUNTY OF SETTLEMENT FOR EXPENSE INCURRED: JURISDICTION.** Where a county which is sought to be charged with the expenses of an insane person denies the settlement of such person, and gives notice of such denial, the circuit court has exclusive jurisdiction to try the issues, but where no notice of such denial is given, the action to recover for such expenses may be maintained in the district court. *Winneshek County v. Allamakee County*, 558.

INSANITY.

1. **BURDEN TO PROVE ON DEFENDANT IN CRIMINAL CASE.** See Criminal Law, 21.
2. **AS A DEFENSE IN MURDER CASE: EPILEPSY AS EVIDENCE OF.** See Criminal Law, 30.

INSTRUCTIONS.

1. **ERROR WITHOUT PREJUDICE.** The fact that an erroneous instruction was given on the trial is no ground for reversal, where it appears from the whole case that appellant could not have been prejudiced thereby. *Avery, Spangler & Co. v. Chapman*, 144.
2. **CORRECT IN LAW BUT WRONG IN APPLICATION.** An instruction which properly states the law, but which plaintiff claims was not applicable to the theory of his case, could work no prejudice to him, and is no ground of reversal on his appeal. *Kitteringham v. Sioux City & Pacific R'y Co.*, 283.
3. **IN ACTION FOR PERSONAL INJURY.** See Railroads, 14.
4. **REPETITION NOT REQUIRED.** It is not error to refuse to give instructions asked which are fully covered by other instructions given by the court on its own motion. *Parsons v. Thomas*, 319; *Votaw v. Diehl*, 676.
5. **REFUSAL TO GRANT: NO PREJUDICE.** There is no error in refusing instructions asked, when, in view of the instructions given, they are not necessary to guide the jury in the proper determination of the case. *State v. Castello*, 404.

6. **MUST REGARD THE EVIDENCE.** An instruction which takes for granted a state of facts not supported by the evidence is erroneous. *Dimmick v. Council Bluffs & St. Louis R'y Co.*, 409.
7. **ASSUMPTION OF CONCESSION NOT MADE.** Where the negligence complained of was the dangerous condition of a frog, and defendant averred in its answer that the deceased "could well have known of its location and construction, and the dangers thereof, if any such dangers existed in fact," this was not a confession and avoidance of the dangerous condition of the frog, and an instruction based upon the theory that it was erroneous. *Coates v. B., C. R. & N. R'y Co.*, 486.
8. **MUST PERTAIN TO THE ISSUES AND BE FOUNDED UPON THE EVIDENCE.** An instruction which presents issues not made by the pleadings, or which calls for a finding of facts of which there is no evidence, is erroneous. *Troughear v. Lower Vein Coal Co.*, 576.
9. **IN CASES OF MURDER.** See Criminal Law, 31.
10. **ERROR IN CURED BY VERDICT.** See Criminal Law, 17.

INSURANCE.

1. **PROVISION RESTRICTING SALE STRICTLY CONSTRUED AGAINST INSURER.** A provision in a policy of insurance, which imposes a restriction upon the right of disposing of the insured property, should be strictly construed against the insurer; and, to constitute a sale within the meaning of such a provision, the right to the property sold, and to the possession thereof, must pass from the vendor to the vendee. And where the insured entered into a contract to convey the property at a future day upon payment of the purchase money, but before the contract was consummated and possession given the property was destroyed by fire, *held* that the insured had not parted with his insurable interest, and that he could recover on the policy, notwithstanding a provision therein that the policy should be void in case of a sale made without the consent of the company. *Kempton v. State Ins. Co.*, 83.
2. **CONDITION IN POLICY ENFORCED.** Where a policy of insurance contained the following condition: "The commencement of foreclosure or other proceedings upon any mortgage shall immediately render this policy null and void," and, subsequently to the execution of the policy, foreclosure proceedings were commenced upon a mortgage covering the property insured, under which the property was sold prior to its destruction by fire, *held* that no recovery could be had upon the policy. *Meadows v. Hawkeye Ins. Co.*, 387.
3. **FORFEITURE OF POLICY BY NON-PAYMENT OF PREMIUM: FACTS NOT CONSTITUTING.** Where defendant issued and sent by mail to the plaintiff a policy of insurance on his drug-store, and with it sent a letter stating that its agent, M., would call upon plaintiff in a few days and settle for the policy, and, when M. called at plaintiff's place of business to make settlement and collect the premium, plaintiff was not at home, and M. requested plaintiff's son to tell plaintiff to forward the premium to the company, and it would be all right, *held* that plaintiff had a reasonable time, after being notified by his son, within which to forward the premium; that such reasonable time was determined by all the circumstances in the case, including the former dealings between the parties in respect to like business; that the defendant had no right to cancel the policy for the non-payment of premium before the expiration of such reasonable time; and that, a loss having occurred within that time, after notice to plaintiff that the policy had been canceled, and before the premium had been tendered, defendant could not avoid liability upon the policy on the ground that it had been canceled for the non-

payment of the premium, notwithstanding a clause in the policy that it should be void if the premium should be unpaid. *Carson v. German Ins. Co.*, 433.

4. **WAIVER OF PROOFS OF LOSS.** Where a policy of insurance required that proofs of loss should be furnished to the company within thirty days after it occurred, but within that time the company informed the insured that the policy had been canceled prior to the loss, and that it would pay nothing thereon, *held* that this was equivalent to saying to the insured that he need furnish no proofs, as the loss would not be paid if he did; and to an action on the policy the failure of the insured to furnish proofs of loss within the thirty days was no valid defense. *Id.*

INTEREST.

1. **ON VERDICT FROM DATE OF RENDITION TO DATE OF JUDGMENT.** See Verdict, 5.

INTOXICATING LIQUORS.

1. **TOWN ORDINANCES CONCERNING.** See Criminal Law, 1, 2; Cities and Towns, 4.
2. **UNLAWFUL SALE OF TO HUSBAND: ACTION BY WIFE FOR DAMAGES: PLEADING: EVIDENCE.** In an action by a woman for damages occasioned by the unlawful sale of intoxicating liquors to her husband, where the owner of the saloon building was not made a party, and it was not sought to create a lien upon the building for the damages, a description of the saloon property in the petition was mere surplusage, and plaintiff was not limited to the proof of damages occasioned by sales made in the building so described. *Gustafson v. Wind*, 231.
3. ———: ———: **EVIDENCE.** In consideration of the defense made in this case, evidence of sales made more than two years prior to the beginning of the action was properly admitted as rebutting testimony. *Id.*
4. **UNLAWFUL SALE OF: LIEN UPON BUILDING AS AFFECTED BY OWNER'S KNOWLEDGE.** In order to the establishment of a lien upon the building in which intoxicating liquors are unlawfully sold, under § 1558 of the Code, the consent of the owner to the unlawful sales need not be shown by any positive and affirmative act, but may be inferred from circumstances, and from knowledge of the illegal sales under such conditions as properly to call forth a protest, and a failure to make any objection. See *Putney v. O'Brien*, 53 Iowa, 117. *Loan v. Etzel*, 429.

JUDGE.

1. **ABSENCE OF DURING ARGUMENT TO JURY.** See Practice, 14.
2. **GRATUITOUS REMARKS OF IN CRIMINAL CASE: EFFECT OF CONSIDERED.** See Criminal Law, 29.

JUDGMENT AND DECREE.

1. **JUDGMENT AGAINST GARNISHEE FOR FAILING TO ANSWER, WHEN HE HAS NO NOTICE OF THE TIME AND PLACE OF ANSWERING, IS INVALID, AND MAY BE SET ASIDE ON MOTION MADE AT A SUBSEQUENT TERM.** See Garnishment, 2, 3.
2. **OFFER TO CONFESS: EFFECT ON COSTS.** See Costs, 1.
3. **VACATION OF: PETITION OR MOTION FOR: PRACTICE.** See New Trial, 3.

4. **VACATING JOINT JUDGMENT: PRACTICE.** Where a judgment was rendered in favor of two defendants jointly, and upon the application of one of the defendants it appeared that it ought to be set aside for fraud or unavoidable casualty, *held* that it should be set aside as to both defendants, and not only as to the one making the application. *Town of Storm Lake v. Iowa Falls & S. C. R'y Co.*, 218.
 5. **JUDGMENT OF DISTRICT COURT: PRESUMPTION IN FAVOR OF.** Where an action was founded upon a guardian's bond, and also upon a promissory note, and a judgment was rendered against defendant in the cause, but it does not appear whether upon the bond or upon the note, and it might have been upon the note, this court will not reverse the judgment on the ground that the court below had no jurisdiction of the action upon the guardian's bond, because the guardian's accounts had not been settled in the circuit court. *Morris v. Steele*, 223.
 6. **JUDGMENT: PARTIES JOINTLY BOUND: SEVERAL JUDGMENTS SET ASIDE.** Where the evidence showed the defendants jointly liable for a certain sum, separate judgments against the several defendants for sums aggregating more than their joint liability were unauthorized and are set aside. *McArthur v. Linderman*, 307.
 7. **JUDGMENT: ON PETITION FILED TOO LATE: NOT VOID.** Where a petition is filed on a day later than that named in the original notice, it is proper for the court to discontinue the cause; and it is error to refuse to dismiss such petition; but a judgment recovered upon a petition filed too late is not void, and cannot be collaterally impeached. The irregularity must be corrected by appeal, or in some other direct method known to the law. *Hildreth v. Harney*, 420.
 8. **DECREE FIXING PRIORITY AND DISTRIBUTION OF LIENS: CONSTRUCTION OF.** See Foreclosure, 2.
 9. **AGAINST DECEDENT: COLLECTION OF.** See Estates of Decedents, 3.
- JUDGMENT BY DEFAULT: ACTION TO SET ASIDE: "UNAVOIDABLE CASUALTY OR MISFORTUNE": FACTS NOT CONSTITUTING.** Where an original notice of an action is duly served upon a defendant, a married woman, she must be presumed, in the absence of evidence of mental incapacity, to understand the object and purport of the notice, and how her rights are affected thereby; and where, as in this case, she gave the copy of the notice to her husband, claiming that she did so upon the supposition that it did not relate to her individual rights, and the husband neglected to defend, and thus judgment by default was rendered against her, *held* that she could not have the judgment set aside on the ground of unavoidable casualty or misfortune, under sections 3154, 3157, 3158 of the Code. *Teabout v. Roper*, 603.
10. **JUDGMENT ON APPEAL FROM JUSTICE, TAKEN TOO LATE.** See Appeal, 6.

JUDICIAL SALE.

1. **OF HOMESTEAD, WITHOUT PLATTING, VOID.** See Homestead, 4.
2. **REDEMPTION FROM.** See Redemption.

JURISDICTION.

1. **THE DISTRICT COURT HAS NO JURISDICTION TO ENTERTAIN, ON CHANGE OF VENUE FROM THE CIRCUIT COURT, A CIVIL CAUSE APPEALED FROM A JUSTICE'S COURT.** See Venue, 1.

2. OF CORPORATION BY SERVICE OF ORIGINAL NOTICE UPON AGENT. See Original Notice, 2, 4.
3. ON SERVICE BY PUBLICATION. See Original Notice, 3.
4. OF SHERIFF'S JURY TO CONDEMN RIGHT OF WAY FOR RAILROAD. See Railroads, 21.
5. OF CAUSE PRESENTED WITHOUT ACTION UPON AN AGREED STATEMENT OF FACTS. The courts of this state have no jurisdiction to entertain a cause presented without action upon an agreed statement of facts, unless it is shown by affidavit that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto. Code, § 3408, 3409. *Keeline v. City of Council Bluffs*, 450.
6. OF SUPREME COURT IN CASES INVOLVING LESS THAN \$100. See Appeal, 1, 5, 7.
7. OF COURTS OF EQUITY TO ENJOIN NUISANCE: NOT TAKEN AWAY BY CODE. See Nuisance, 4.
8. OF DISTRICT AND CIRCUIT COURTS OF ACTIONS TO RECOVER OF COUNTY OF SETTLEMENT FOR EXPENSE INCURRED FOR INSANE PERSON. See Insane, 1.
9. OF LOWER COURT NOT LOST BY TAKING OF APPEAL. See Appeal, 11.

JURY.

1. CHALLENGE TO JURORS: RESIDENTS OF DEFENDANT CITY. Where a city is defendant in an action for damages, it has no right to challenge a juror on the ground that he is a resident of the city, but not a taxpayer. *Hollenbeck v. The City of Marshalltown*, 21.
2. FOR CONDEMNATION OF RIGHT OF WAY: JURISDICTION OF. See Railroads, 21.
3. CHALLENGE TO JURORS IN CRIMINAL CASE. See Criminal Law, 27, 28.

LAND.

1. TITLE BY PRE-EMPTION: DES MOINES RIVER GRANT. See Government Lands, 1.

LAW AND FACT.

1. PRACTICE: INTERPRETATION OF LETTERS IN EVIDENCE. Where letters which had passed between the parties were in evidence, and were in plain language, requiring no interpretation, and the jury had all the collateral facts, the determination of their meaning and import was properly left to the jury. *Avery, Spangler & Co. v. Chapman*, 144.

LESSOR AND LESSEE.

1. ACCEPTANCE OF RENT FROM ASSIGNEE OF LESSEE: LESSEE NOT DISCHARGED. Where there is an express covenant to pay rent for a term of years, the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee. *Harris v. Heckman*, 411.
2. DESTRUCTION OF PROPERTY BY FIRE: LESSEE NOT DISCHARGED. Where the lessee of ground owned a wooden building thereon, which was de-

stroyed by fire during the term, and at the date of the lease the city had passed a fire limit ordinance, by which the lessee was prohibited from erecting another wooden building on the ground, *held* that he was not thereby discharged from his liability to pay rent to the end of the term. *Id.*

LIEN.

1. PRIORITY OF: AS BETWEEN SCHOOL FUND MORTGAGE AND SUBSEQUENT TAXES. See School Fund, 1.
2. PRIORITY AND DISTRIBUTION OF UPON MORTGAGE FORECLOSURE. See Foreclosure, 2.

MANDAMUS.

1. TO REINSTATE ONE EXPELLED FROM A CHURCH. Mandamus will not lie to compel a religious corporation to reinstate a member of the church who has been expelled therefrom, in a case where the expulsion was not a corporate act, and did not affect any property interest or other valuable civil right of the expelled member. *Sale v. The First Regular Baptist Church of Mason City*, 26.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANICS' LIEN.

1. TIME OF FILING: WORK ON RAILROAD UNDER SUB-CONTRACTOR. Where work was done upon a railroad under a sub-contractor in July and August, 1881, and the notice required by Code, § 2131, of the filing of the claim for the lien was given October 31, 1881, and, prior to the giving of the notice, the sub-contractor had been paid in full, in accordance with the contract for the work, after its completion, *held* that the lien could not be enforced against the railroad. *Nash & Phelps v. C., M. & St. P. R'y Co.*, 49.
2. PETITION FOR FORECLOSURE OF: PLEADING. See Pleading, 4.
3. FORECLOSURE OF: APPEAL TO SUPREME COURT: AMOUNT OF SUPERSEDEAS BOND. See Appeal, 8.
4. OF SUB-CONTRACTOR: AVOIDANCE OF BY PAYMENT TO PRINCIPAL CONTRACTOR. Where a sub-contractor furnishes to the principal contractor materials for a house, and duly files his claim for a mechanics' lien, and gives notice thereof to the owner within thirty days after the last of the materials are furnished, but, at the time of the service of the notice, the owner has paid the principal contractor in full, pursuant to the terms of his contract, the lien will be enforced, provided the owner had *actual* notice of the facts out of which grew the sub-contractor's claim. In the absence of any such notice, payment in good faith to the principal contractor, pursuant to the terms of the contract, will defeat the lien. See *Stewart v. Wright*, 52 Iowa, 335, and *Winter v. Hudson*, 54 Id., 336. *Andrews & Smith v. Burdick & Goble*, 714.
5. —: PAYMENT TO CONTRACTOR WHERE WORK IS DEFERRED. Where a contractor agrees to finish a house by a stated time, at which he is to receive his final payment, and the work is not then finished, but, with the consent of the owner, it is finished at a later day, the last payment is not due until the work is actually finished; and, in the absence of any

other contract, compensation for extra work is not due till the work is finished; and it would *seem* that payment in such a case, before the actual completion of the work, would not be good as against a sub-contractor otherwise entitled to a lien. *Id.*

6. —: HOW AFFECTED BY ALTERATION OF PRINCIPAL CONTRACT. Where a builders' contract is changed in a material point, without authority, after its execution, but a sub-contractor is not prejudiced in any way by such alteration, his right to a mechanics' lien will not be enlarged on account thereof. *Id.*

MERGER.

1. CERTIFICATE OF PURCHASE NOT MERGED IN VOID TAX DEED. See Tax Sale and Deed, 5.
2. OF MORTGAGE IN LEGAL TITLE: FACTS NOT CONSTITUTING. See Mortgage, 7.

MINING COMPANY.

1. NOT LIABLE FOR INJURY TO EMPLOYE THROUGH NEGLIGENCE OF CO-EMPLOYE. See Negligence, 7.

MISTAKE.

1. IN DESCRIPTION IN MORTGAGE: SUBSEQUENT MORTGAGEE WITH NOTICE: PRIORITY OF LIEN. See Mortgage, 5, 6.

MORTGAGE.

1. OBTAINED BY DURESS: INNOCENT HOLDER. See Contract, 1, 2.
2. OBTAINED BY UNDUE INFLUENCE UPON A FEEBLE MIND, SET ASIDE. See Contract, 19.
3. ASSIGNMENT OF NOT RECORDED: FRAUDULENT RELEASE OF BY MORTGAGEE: EQUITIES AS BETWEEN ASSIGNEE AND PURCHASER OF THE MORTGAGED PREMISES. In 1868, G. W. K. executed a mortgage to J. K., who in the same year sold and assigned it to plaintiff, but plaintiff never had the assignment recorded. In 1880, G. W. K. traded the mortgaged premises to defendants for another tract of land, and conveyances were made accordingly. Defendants at the time knew of the mortgage made by G. W. K., but did not know that it had been assigned by J. K. to any one; and, to secure them against said mortgage, G. W. K. executed to them a mortgage on the land conveyed to him in the exchange. Afterwards J. K., in fraud of his assignee, released of record the mortgage made to him, in consideration of which the defendants, still ignorant of the assignment made by J. K., and innocent of the fraud practiced by him, released of record the mortgage made by G. W. K. to them. *Held* that plaintiff, having, by her negligence in not having her assignment recorded, left the way open for the fraud of her assignor, whereby the defendants, acting in good faith, had been led to a satisfaction of their mortgage, could not have her mortgage reinstated and foreclosed as against the defendants. *Daws v. Craig*, 515.
4. OMISSION TO STATE AMOUNT OF NOTE SECURED THEREBY: EFFECT OF NOTICE. All written instruments referred to in deeds and contracts, with sufficient explicitness to identify them, are to be regarded as so far constituting a part of such deeds and contracts as to be read with them, in order to determine their terms and conditions. Accordingly, where

a mortgage failed to recite the amount of the note secured thereby, but referred to the note by its date, the names of the maker and payee, the date of its maturity, the rate of interest provided for and the time it became payable, *held* that this was sufficient to identify the note, and that the recording of the mortgage gave notice to a subsequent mortgagee of the existence of the lien and the amount thereof. See authorities collated by Beck, J. *Fetes v. O'Laughlin*, 532.

5. **MISTAKE IN DESCRIPTION: RECORD NOTICE TO SUBSEQUENT MORTGAGEE.** Where the property intended to be mortgaged was in "Zollar's addition," but by mistake it was described as being in "Zulauf's addition"—there being additions of both names to the city in question—and the index in the recorder's office showed the mortgaged property as being in Zulauf's addition, but referred to the complete record for a fuller description, *held* that a subsequent mortgagee was bound only by what appeared upon the index, and that he was not charged with constructive notice that the property was in fact in "Zollar's addition," though he might have suspected as much, had he examined the complete record. *Peters v. Ham*, 656.
6. ———: **SUBSEQUENT MORTGAGEE WITH ACTUAL NOTICE: PRIORITY OF LIEN.** Where one, intending to mortgage to plaintiff certain property, by mistake erroneously described the property, but the mortgage was recorded as made, and afterwards, upon discovering the mistake, he made another mortgage to plaintiff to secure the same indebtedness, correctly describing the property, and on the date of the last mortgage he also made a mortgage to defendants upon the same property, defendants having actual notice at the time of plaintiff's prior mortgage and the mistake therein, *held* that, as against defendants, the lien of plaintiff's corrected mortgage related back to the date of his first mortgage, and was superior to the lien of defendants' mortgage, notwithstanding defendants' mortgage was filed for record before plaintiff's corrected mortgage. *Day v. Griffith*, 15 Iowa, 104, and *Cobb v. Chase*, 54 Id., 253, distinguished. *Id.*
7. **PAYMENT OR PURCHASE OF: MERGER: REDEMPTION.** Where one obtains the legal title to land under the foreclosure of a mortgage made by another, and he afterwards purchases and has assigned to him a junior mortgage made by the same mortgagor upon the same land, under the circumstances revealed in this case, the transaction will not be regarded as a payment of the junior mortgage, and a judgment creditor, not made a party to the foreclosure suit, and whose judgment is of later date than the junior mortgage thus purchased, cannot redeem in equity from such purchaser, without paying the amount of the junior as well as of the senior mortgage. *Spurgin v. Adamson*, 661.

8. **OF CHATELS.** See Chattel Mortgage.

MUNICIPAL CORPORATION.

1. **SCHOOL DISTRICT IS.** See School District, 2.

See CITIES AND TOWNS.

COUNTY.

MURDER.

See CRIMINAL LAW, 10, 11, 13, 14, 17, 18, 19, 20, 29, 30, 31.

NAMES.

1. USE OF INITIALS FOR CHRISTIAN NAMES IN OFFICIAL PAPERS NOT APPROVED. See Depositions, 1.

NEGLIGENCE.

1. RESTRAINT OF VICIOUS DOG: OWNER OR BAILEE. One who has charge of a vicious dog, whether as owner or bailee, knowing him to be vicious, must restrain him, and if he fails so to do he will be liable in damages to any person injured thereby. *Marsel v. Bowman*, 57.
2. STOCK RUNNING AT LARGE: OPEN PIT ON LAND NOT INCLOSED: INJURY TO HORSE FALLING THEREIN. In a county where stock is not restrained from running at large, the owner of a horse is not chargeable with negligence in permitting him to stray upon the uninclosed and uncultivated land of another. But where defendant dug a well adjacent to the highway upon her uninclosed and uncultivated land, at a place which she knew was frequented by stock running at large, and left the same unguarded and uncovered, she was guilty of negligence, and was liable in damages to plaintiff, whose horse, while running lawfully at large, fell into the well and was killed. *Haughey v. Hart*, 96.
3. IN "BACKING" TRAIN WITHOUT SIGNAL FROM BRAKEMAN. See Railroads, 8.
4. CONTRIBUTORY: DOES NOT NECESSARILY DEFEAT RECOVERY. The contributory negligence of the person injured will not excuse the other negligent party, if the contributory negligence was known to him, and he could have avoided the injury by the exercise of reasonable care. *Romick v. C., R. I. & P. R'y Co.*, 167.
5. ESTABLISHMENT OF BY EXPERT TESTIMONY. See Evidence, 37.
6. HOW AFFECTED BY THE KNOWLEDGE, OR MEANS OF KNOWLEDGE, OF THE NEGLIGENT PARTY. See Railroads, 13, 15.
7. OF CO-EMPLOYEE: MINING COMPANY NOT LIABLE FOR INJURY OCCASIONED BY. A mining company is not liable for injuries caused to one of its employes by the negligence of a co-employee. *Peterson v. The White Breast Coal & Mining Company*, 50 Iowa, 673, followed. *Troughear v. Lower Vein Coal Co.*, 576.
8. CONTRIBUTORY: DEFEATS RECOVERY. See Railroads, 32, 36.
9. ———: IN APPROACHING RAILWAY CROSSING. See Railroads, 33.
10. SOUNDING WHISTLE AT RAILWAY CROSSING IS NOT. See Railroads, 34.
11. IN REGARD TO SNOW-BANKS ALONG RAILWAYS. See Railroads, 35.
12. CONTRIBUTORY: RIDING IN FREIGHT CAR INSTEAD OF "CABOOSE." See Railroads, 36.
13. ———: QUESTION FOR JURY. See Railroads, 39.

NEGOTIABLE INSTRUMENTS

See PROMISSORY NOTE.

BANK CHECK.

NEW TRIAL.

1. **UPON NOTICE BY PUBLICATION ONLY: WHO ENTITLED TO.** See Original Notice, 1.
2. **MOTION FOR: TIME OF FILING.** A motion for a new trial must be filed at the same term and within three days after the verdict. Code § 2838. And the fact that the court is not in session for a few days after the verdict, in the midst of the term, will not prolong the time for filing such motion. *Ewaldt v. Farlow*, 212.
3. **PROCEEDINGS TO OBTAIN: IRREGULARITY WAIVED.** One who seeks, under section 3154 of the Code, to vacate a judgment after the term at which it was rendered, and to obtain a new trial, on the ground of fraud, or of unavoidable casualty, should file his verified petition, setting forth the facts on which he relies; but where, as in this case, he simply filed a motion, accompanied by affidavits setting forth the facts, and upon these papers a hearing was had without objection by the adverse party in the court below, *held* that objection to the irregularity of the proceedings could not for the first time be urged in this court. *Town of Storm Lake v. Iowa Falls & S. C. R'y Co.*, 218.
4. **UPON SPECIAL VERDICT FOUND WITHOUT EVIDENCE.** See Verdict, 4.
5. **PETITION FOR: MERITORIOUS DEFENSE.** Where the petition for a new trial states facts which, if true, constitute a meritorious defense to the cause in which the new trial is asked, a new trial should not be denied, simply because the evidence is not conclusive as to the facts. It is the province of the jury on the new trial to determine the weight of the evidence. *State Ins. Co. v. Granger*, 272.

NOTARY PUBLIC.

1. **LIABILITY FOR FALSE CERTIFICATE OF ACKNOWLEDGMENT.** The liability of an officer for making a false certificate of acknowledgment is fixed by statute, and, to become liable therefor under the statute, he must make the false certificate, not only negligently, but "knowingly." Code, § 1964. *Scotten v. Fegan*, 236.

NOTICE.

1. **TO REDEEM FROM TAX SALE: DEFECTIVE: CONSEQUENCES OF.** See Tax Sale and Deed, 5.
2. **OF CLAIM BY THIRD PARTY TO PROPERTY LEVIED ON: ONE NOTICE—SEVERAL EXECUTIONS.** See Execution, 3.
3. **TO AGENT: BINDS PRINCIPAL.** See Husband and Wife, 5.
4. **OF AMOUNT OF NOTE SECURED BY RECORDED MORTGAGE IN WHICH THE AMOUNT WAS NOT RECITED.** See Mortgage, 4.
5. **RELIANCE UPON DESCRIPTION IN INDEX TO MORTGAGE RECORDS.** See Mortgage, 5.

NUISANCE.

1. **BARN AND PRIVY: ESTABLISHED FRONTAGE OF CITY LOTS TO BE RESPECTED.** When lots are laid out in a city, with an established frontage, those who purchase inside lots do so with the expectation that the owners of corner lots will build in accordance with the established frontage; and, if they change their frontage, and so build as to cause the

rear of their lots to abut upon the inside lots, equity will so control the location of their outbuildings as to prevent them from interfering with the enjoyment of the occupant of the inside lots. *Cook v. Benson*, 170.

2. **SLAUGHTER-HOUSES IN CERTAIN LOCATIONS ARE PRIMA FACIE.** A slaughter-house in a city or public place, or near a highway, or where numerous persons reside, is *prima facie* a nuisance. It is accordingly held that the slaughter-house of defendants, situated as it is shown to be by the evidence, must be regarded as a nuisance. *Bushnell v. Robeson*, 540.
3. **ACTION TO ENJOIN: PARTIES PLAINTIFF: JOINDER.** Although a nuisance may affect the public at large, yet, where an individual suffers special injury therefrom, he is entitled to sue for relief; and several individuals so specially injured in the enjoyment of their homes may join in an action for the abatement of the nuisance, notwithstanding they severally own the property on which they reside. *Id.*
4. **REMEDY BY INJUNCTION IN EQUITY: STATUTES CONSTRUED.** Inasmuch as courts of equity, prior to the adoption of the Code of 1873, had jurisdiction to restrain by injunction the continuance of nuisances, that jurisdiction still exists, (Code, § § 2508, 3386,) notwithstanding a remedy by action at law is provided by section 3331 of the Code. *Id.*
5. **PRIOR ESTABLISHMENT OF: USE OF ADJACENT LAND NOT PREJUDICED BY.** One person cannot erect a nuisance upon his land adjoining vacant land owned by another, and thus measurably control the use to which his neighbor's land may in the future be subjected; and the fact that the nuisance in this case complained of was erected prior to the time when plaintiffs built their residences upon the neighboring lots, is no reason why a court of equity should remit them to a court of law for their remedy. *Id.*
6. **ABATEMENT IN EQUITY: CONDITIONAL OR UNCONDITIONAL DECREE: PRACTICE.** Where a court finds an establishment (a slaughter-house in this case) to be a nuisance as conducted, it should allow the defendants to show, if they can, that it is possible to continue the business in the same place without its being a nuisance. If this can be done, the court should by its decree determine the conditions upon which the business may be continued; otherwise the decree should unconditionally enjoin the further operation of the establishment. *Id.*

ORDINANCES.

1. **INFORMATION UNDER: DUPLICITY.** See Criminal Law, 1, 2.
2. **PARTLY ILLEGAL—REMAINDER VALID.** See Cities and Towns, 4.
3. **EVIDENCE OF PUBLICATION: ORAL SUFFICIENT.** See Cities and Towns, 5.
4. **PASSAGE OF: SUSPENSION OF RULES: REGULARITY PRESUMED.** See Cities and Towns, 6.
5. **VOID: POWER OF LEGISLATURE TO LEGALIZE.** See Constitutional Law, 2.

ORIGINAL NOTICE.

1. **SERVICE BY PUBLICATION: RE-TRIAL.** Where the service of the original notice is by publication only, parties legally representing the defendant may have a re-trial of the cause, upon application made therefor within two years after judgment. Code § 2877. In this case, where the title to real estate was involved, the widow and children of the defendant were entitled to such re-trial. *Williamson v. Wachenheim*, 196.

2. **SERVICE UPON AGENT OF CORPORATION: STATUTE CONSTRUED.** While section 2613 of the Code provides that, "where a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of such office or agency," *held* that this statute does not warrant the service of the notice upon one agent, in an action growing out of the business of another and former agent, who conducted a different office in the same town; and that a notice so served did not give the court jurisdiction over the principal. *State Ins. Co. v. Granger*, 272.
3. **SERVICE BY PUBLICATION: AUTHORITY OF CLERK TO ORDER.** Under the laws in force in September, 1857, the clerk of the district court had no authority to order the publication of an original notice in a foreclosure proceeding, upon the return of the sheriff, "not found," and such notice gave the court no jurisdiction of the defendant, and the proceedings based thereon were void, and did not serve to convey the defendant's title to the mortgaged premises to the purchaser at the foreclosure sale. *Royer v. Foster*, 321.
4. **SERVICE UPON AGENT OF CORPORATION: NO JURISDICTION.** Upon consideration of the evidence in this case, it appears that the person upon whom notice was served, for the purpose of obtaining jurisdiction of the defendant corporation, was not employed in any office or agency for the defendant in this state, (Code, § 2613,) was not appointed agent of the defendant under section 1165 of the Code, and was not employed in the general management of defendant's business, as contemplated by section 2612 of the Code; and it is therefore *held* that the court obtained no jurisdiction by such service to render judgment upon default against the defendant. *Philp v. Covenant Mut. Ben. Asso.*, 633.

PARTIES.

1. **TO ACTION TO CONDEMN RIGHT OF WAY FOR CITY STREET.** See Cities and Towns, 8.
2. **SECURING LEAVE TO BE HEARD IN THE ARGUMENT OF A CASE DOES NOT MAKE ONE A PARTY THERETO.** See Former Adjudication, 3.
3. **IN ACTION ON INDEMNIFYING BOND: JOINDER: ESTOPPEL.** See Execution, 4.
3. **IN ACTION TO ABATE NUISANCE: JOINDER OF PLAINTIFFS.** See Nuisance, 3.
4. **WHO SHOULD BE MADE DEFENDANTS IN ACTION IN EQUITY.** See Equity, 4.

PARTITION.

1. **APPEAL FROM DECREE IN: AT WHAT POINT IN THE PROCEEDINGS TO BE TAKEN.** A decree in an action for the partition of real estate, settling the shares and interests of the parties, is in effect final as to those shares and interests, and from such a decree an appeal will lie; and it is the better practice, to say the least, to take an appeal at that point in the proceedings, rather than to wait until after the approval and confirmation of the report of the commissioners, whose only duty it is to divide the land or proceeds in accordance with the terms of that decree. *Williams v. Wells*, 740.

PARTNERSHIP.

1. **APPROPRIATION OF FIRM PROPERTY BY PARTNER: LIABILITY TO CO-PARTNER.** Where a partner with the assent of his copartner appropriates firm property to the payment of his individual debts, he will, notwithstanding such assent, be held to account to his copartner for the property so appropriated. *Currier v. Bates*, 527.
2. **PAYMENT OF PARTNER'S DEBTS WITH FIRM PROPERTY.** Where a member of a co-partnership is indebted to a person owing the firm, he cannot apply the indebtedness to the firm for the purpose of canceling his personal indebtedness to the firm's debtor, without the consent of his copartner, or his subsequent ratification; and such adjustment will not avail the debtor to the firm as a defense, in an action by the assignee of the firm to recover the amount of the indebtedness. See authorities collected by ADAMS, J. *Thomas v. Stetson*, 537.
3. **ASSIGNMENT FOR BENEFIT OF CREDITORS: INDIVIDUAL INDEBTEDNESS OF PARTNER: FACTS NOT CONSTITUTING.** S. & A., who were partners, borrowed of a bank a sum of money, for \$1,500 of which they gave a note signed by them individually and endorsed by another, and for the residue they gave the notes of their firm. The \$1,500 was designed to be used, (as the bank knew at the time,) and was used, to pay the individual indebtedness of S., and S. was charged with the amount on the firm books. There was at this time no evidence that the firm was insolvent. Afterwards the notes were all taken up, and firm notes, secured by chattel mortgage, given for the whole loan. S. & A. subsequently made an assignment for the benefit of their creditors:—*Held* that the assignee was bound to pay the whole amount of the chattel mortgage out of the assets of the firm, and that the objection of the creditors that a portion thereof was the personal indebtedness of S. could not be sustained. *Assignment of Stewart & Aiman*, 614.
4. **CONVEYANCE OF LAND TO PARTNER FOR DEBT TO FIRM: POWER OF PARTNER TO DISPOSE OF SAME.** Where land was conveyed to a partner in payment of a debt due the firm, and the word "trustee" was written in the deed after the partner's name, the object and understanding being that the deed should be so made, instead of to the firm, for greater convenience in again conveying the land when it should be sold, *held* that the partner had the right and power to bind his fellow partners by the sale of the land through an attorney in fact appointed by him for that purpose, and that the word "trustee" in the deed neither enlarged nor restricted his power—the property being regarded as personal assets of the firm, as to which one partner may bind all the others by any contract made within the scope of the partnership. *Paton v. Baker*, 704.

PAUPERS.

1. **ACTION AGAINST COUNTY OF SETTLEMENT FOR SUPPORT OF: PLEADING.** In an action by one county against another for aid furnished to paupers claimed to have a settlement in the defendant county, it is not sufficient for plaintiff to aver that *it is informed* that the paupers have a settlement in the defendant county. *Winneschiek County v. Allamakee County*, 558.
2. —: **ESTOPPEL OF DEFENDANT TO DENY SETTLEMENT: FACTS NOT CONSTITUTING.** The giving of notice by the plaintiff to the defendant county that certain paupers had applied for and were receiving aid from the plaintiff, and that defendant was required to provide for the paupers, as contemplated by section 1357 of the Code, and that plaintiff would hold defendant responsible for expenses incurred, followed by

the neglect of defendant to notify plaintiff that it denied the settlement and refused to be liable for the support of the paupers, did not estop defendant from denying the settlement of the paupers in an action to recover for aid rendered by the plaintiff county. The estoppel provided for by section 1359 of the Code is not created by these facts, but by others recited in the section last named. *Id.*

PAYMENT.

1. **OF OPEN ACCOUNT TO ASSIGNOR AFTER NOTICE OF ASSIGNMENT.** See Assignment, 1, 2.

PERJURY.

1. **FACTS NOT CONSTITUTING: OATH BEFORE ASSESSOR.** See Criminal Law, 5.

PETITION.

1. **FILED TOO LATE: JUDGMENT ON NOT VOID.** See Judgment and Decree, 7.

PLEADING.

1. **DURESS AS A DEFENSE: ANSWER AIDED BY EVIDENCE.** See Practice, 4.
2. **PRACTICE: ARGUMENTATIVE DENIAL STRICKEN OUT.** Where, in addition to a general denial, defendant pleaded matter which amounted to nothing more than an argumentative denial, all of which was admissible under the general denial, the striking out of such matter on motion could not have prejudiced the defendant, and was not error. *DeForrest v. Butler*, 78,
3. **OFFER TO PAY: IN ACTION TO REDEEM.** See Redemption, 2.
4. **MECHANICS' LIEN: PETITION FOR FORECLOSURE OF.** A petition for the foreclosure of a mechanics' lien is fatally defective, which fails to state that something was due for the services on which the lien was founded at the time the action was begun. A statement for a lien, which is attached to the petition as an exhibit, but which was made out and filed some months before the beginning of the action, and in which it is alleged that something was due when the statement was made, cannot supply the place of an averment that something was due when the action was begun. *Stubbs v. Clarinda, College Springs & S. W. R'y Co.*, 280.
5. **EXEMPLARY DAMAGES: NO AVERMENT FOR NECESSARY.** Exemplary damages are not the subject of a claim in the sense that it is necessary to make an averment thereof in the petition; but such damages may always, in a proper case, be allowed by the jury without any such averment. *Gustafson v. Wind*, 281.
6. **REPLY TO ANSWER WHICH DOES NOT PRESENT A COUNTER-CLAIM.** An answer which is not a counter-claim is considered denied, and a reply denying such answer is not allowed. Code, § 2665. And, where a reply both denies the allegations of such an answer, and pleads matter in avoidance thereof, the denial must be disregarded, and the plea in avoidance must be regarded as implying a confession of the answer. *Meadows v. Hawkeye Ins. Co.*, 387.
7. **ALLEGATION OF AGENT'S AUTHORITY.** In an action to recover for services rendered to a county, where the plaintiff alleged that he was employed by the county, through an agent, this was a sufficient allegation

of employment by the county, and it was not necessary to aver the agent's authority. *Call v. Hamilton County*, 448.

8. **CAUSE OF ACTION NOT STATED IN ONE COUNT: OBJECTION WAIVED.** When a petition contains more than one cause of action, each must be stated in a count or division by itself, and must be sufficient in itself; (Code, § 2646;) but, even when this rule is violated, the defendant must make his objection in the court below, and, if he fails to do so and goes to trial, he thereby waives the objection. *Cruver v. C., M. & St. P. R'y Co.*, 460.
9. **CONFESSION AND AVOIDANCE: FACTS NOT CONSTITUTING.** See Instructions, 7.
10. **CROSS PETITION UPON ATTACHMENT BOND: DEFECT OF ALLEGATIONS AND EVIDENCE: PRACTICE.** In a cross-action in an attachment suit for the wrongful suing out of the writ, the defendant must allege that the damages which he claims to have sustained *have not been paid*; and a cross-petition defective in this respect should be assailed by demurrer. But, where this allegation is wanting, and no evidence of any damages is offered on the trial, and yet a judgment for damages is rendered, the defect may be urged for the first time upon a motion for a new trial. *Hencke v. Johnson*, 555.
11. **IN ACTION AGAINST COUNTY OF SETTLEMENT FOR AID TO PAUPERS.** See Paupers, 1.
12. **ACTION TO SET ASIDE CONVEYANCE: CONSIDERATION: PAYMENT OF AND OFFER TO RETURN.** When an action is brought to set aside a conveyance of real property, the petition is open to demurrer, unless it contains an offer to repay any consideration alleged to have been received by the plaintiff. If the petition is silent as to the receipt of consideration, it is vulnerable to a motion for a more specific statement, or the defendant may, as a defense, in his answer set up the payment on his part, and the failure of plaintiff to plead an offer to repay the same; but, if he fails in one of these methods to raise the defense that plaintiff has not offered to repay the consideration received, he will be deemed to have waived the same, and he cannot afterwards urge it upon the trial. Code, § 2650. *Seymour v. Shea*, 708.
13. **IN ACTION BY WIFE AGAINST SALOON-KEEPER FOR SALE OF LIQUORS TO HUSBAND: SURPLUSAGE.** See Intoxicating liquors, 2.

POSSESSION.

1. **AS EVIDENCE OF OWNERSHIP OF CHATTELS.** See Evidence, 76.

POWER OF ATTORNEY.

1. **POWER TO SELL IS NOT POWER TO EXCHANGE.** See Attorney in Fact, 1.

PRACTICE.

1. **CROSS-EXAMINATION.** Where defendant's counsel were absent during the examination in chief of plaintiff on his own behalf, it was not competent to require him, by general questions on cross-examination, to make a recital of what he had testified in chief. *Winklemans v. The Des Moines & Northwestern R'y Co.*, 11.
2. **SPECIAL INTERROGATORIES TO JURY IN RIGHT OF WAY CASE.** See Railroads, 6.

3. **BEFORE REFEREE: PRESERVING EVIDENCE.** This case was tried before a referee, and, as it nowhere appears from the record that the evidence was preserved by bill of exceptions, or by any certificate of the referee, or that it was in any way identified, and as no errors are found in the conclusions of law made by the referee, the judgment of the court below upon the referee's report must be affirmed. *Donovan v. Hayes*, 36.
4. **ANSWER AIDED BY EVIDENCE.** Where the facts set up in the answer, considered in the light of evidence admitted without objection, were sufficient to constitute the defense of duress, such defense will be considered as having been made. *First National Bank of Nevada v. Bryan*, 42.
5. **PLEADING: ARGUMENTATIVE DENIAL STRICKEN OUT.** See Pleading, 2.
6. **BILL OF EXCEPTIONS: REPORTER'S NOTES.** Where the original notes of the short-hand reporter are by reference incorporated into a bill of exceptions, the record is in substance complete, so far as the evidence embraced therein is concerned, whether the reporter's notes have been certified to by him or not; they will be presumed to have been filed. If a long-hand extension of the notes becomes necessary, it is not for the purpose of completing the record, but only for the purpose of making the completed record intelligible. *Hampton v. Moorhead*, 91.
7. **MOTION FOR NEW TRIAL: TIME OF FILING.** See New Trial, 2.
8. **EVIDENCE: ORDER OF INTRODUCTION.** A cause will not be reversed merely because secondary evidence of the contents of a written contract was admitted before the loss of the writing was established, when a sufficient foundation for the secondary evidence was afterwards supplied by the testimony of the adverse party. *Louis Cook Manuf. Co. v. Randall & Dickey*, 244.
9. **CERTIFICATE FOR APPEAL TO SUPREME COURT: TIME OF FILING.** See Appeal, 5.
10. **TAKING CASE FROM JURY: PLEADING NOT SUSTAINED BY EVIDENCE.** Where the ground of action as stated in the petition is not supported by the evidence, the court may properly take the case from the jury and dismiss the cause upon defendant's motion. *Gilman v. Sioux City & Pacific R'y Co.*, 299.
11. **ERROR CURED BY SUBSEQUENT RULING: NO PREJUDICE.** Where the effect of an alleged error is cured by a subsequent ruling in the case, no prejudice results, and it is no ground for reversal. *Stange v. City of Dubuque*, 303.
12. **RENDERING JUDGMENT AGAINST PARTIES JOINTLY BOUND.** See Judgment and Decree, 6.
13. **ON APPEAL FROM JUSTICE, TAKEN TOO LATE.** See Appeal, 6.
14. **ABSENCE OF JUDGE DURING ARGUMENT TO JURY.** A judge may properly be absent, when the business of the court requires it, while counsel are addressing the jury; and, unless prejudice is shown, a cause will not be reversed on account of such absence. *Baxter v. Ray*, 336.
15. **DISMISSAL OF ACTION: ESTOPPEL.** Where defendants procured the dismissal of a cause in one court, upon the ground that it was properly pending in the court of another county to which it had been transferred, held that they could not afterwards be heard to say that the court of the other county had no jurisdiction of the cause, and no right to remand it. *Perkins v. Jones*, 345.

16. **DEMURRER WAIVED BY ANSWER.** Any error in the overruling of a demurrer to a petition is waived by the filing of an answer. *Tootle, Livingston & Co. v. Phoenix Ins. Co.*, 362.
17. **OBJECTION TO FORM OF PETITION: WAIVED IF NOT URGED IN TIME.** See Pleading, 8.
18. **DEMURRER WHILE ANSWER ON FILE.** Where an amended petition was filed, whereby the cause of action was radically changed, there was no error in allowing a demurrer thereto without a withdrawal of the answer to the original petition. *Keller v. Bare*, 468.
19. **RECEIVING EVIDENCE UPON POINTS IN A CASE WHICH HAVE BEEN FULLY SUBMITTED.** See Evidence, 56.
20. **PETITION NOT SUFFICIENTLY SPECIFIC: EFFECT ON EVIDENCE.** A petition in equity, filed by several property owners, to abate a nuisance affecting their property, but which fails to state whether the plaintiffs own the property affected jointly or severally, may be vulnerable to a motion for a more specific statement; but defendants, failing to make such motion, cannot on the trial object to evidence tending to show the character and extent of the plaintiffs' interest in the property. *Bushnell v. Robeson*, 540.
21. **BILL OF EXCEPTIONS: WHAT IT MAY INCLUDE.** A party who has moved to set aside a verdict and for a new trial is not limited in a bill of exceptions to the rulings on such motion, but he may embody in his bill all objections to rulings made upon the trial, and which he has not waived. *Dedric v. Hopson*, 562.
22. **UPON PROCEDENDO: DUTY OF COURT.** Where an appeal is taken in an equity case, and it is reviewed upon errors, and remanded to the court below on account of error in admitting a deposition on the part of plaintiff taken without authority of law, the court below, upon *procedendo*, can neither dismiss the cause nor render a decree for defendant, but must try the case anew upon its merits, correcting the errors pointed out in the decision of this court. *Kershman v. Swehla*, 654.
23. **CONTRADICTING ONE'S OWN WITNESS.** See Evidence, 77.
24. **REHEARING OF MOTION.** A motion once overruled cannot be called up again for rehearing by the party who made it, until, upon proper notice to the other party, the order overruling it has been set aside. *Townsend v. Wisner*, 672.
25. **ACTION TO SET ASIDE CONVEYANCE: FAILURE TO RETURN CONSIDERATION: OBJECTION WAIVED.** See Pleading, 12.
26. **CROSS-EXAMINATION: DISCRETION OF COURT.** The extent to which cross-examination may be allowed is peculiarly within the discretion of the court, and a cause will not be reversed for an error in this respect, unless it appears that the court has abused its discretion, and that the complaining party has been greatly prejudiced thereby. *Player v. B., C. R. & N. E'y Co.*, 723.
27. **IN PARTITION OF REAL ESTATE: AT WHAT POINT IN PROCEEDINGS AN APPEAL SHOULD BE TAKEN.** See Partition, 1.
28. **IN CRIMINAL CASES.** See Criminal Law, 1, 2, 9, 27, 28, 29.
29. **EXCEPTIONS: WHEN TO BE TAKEN.** See Exceptions, 1.

PRACTICE IN SUPREME COURT.

1. IN SETTING ASIDE VERDICT. See Verdict, 2, 3, 4, 7, 8.
2. ABSTRACT NOT DENIED TAKEN AS TRUE. Where no additional abstract is filed denying the correctness of the one filed by the appellant, the latter must be taken as true. *Hardy v. Moore*, 65.
3. STRIKING OUT BILL OF EXCEPTIONS. A bill of exceptions will not be stricken from the record on the ground that a paper not properly identified thereby has been interpolated into the transcript and abstract. Such paper might possibly be stricken out on motion. *Id.*
4. REHEARING ONLY ON PETITION. After the court has examined the record in a cause, and filed an opinion dismissing the appeal, on the ground of defects in the record, it is not competent for the appellant, without obtaining a rehearing, to simply ignore the former decision, and bring the case again before the court upon a corrected record. *Green v. Ronen*, 89.
5. ABSTRACTING EVIDENCE: PRESUMPTION IN FAVOR OF ABSTRACT. The appellant may set out the evidence in his abstract from memory, or from his own notes; and, if appellee does not controvert the correctness of such abstract, it will be taken as true, and all questions concerning the reporter's notes and an extension thereof will become immaterial, and the case will be determined upon the evidence as set out in the abstract. *Hampton v. Moorhead*, 91.
6. DISMISSAL OF APPEAL UPON AFFIDAVITS. In order to determine an important right upon mere affidavits, the matter in controversy should not be left in doubt. Accordingly, this court will not dismiss an appeal on the ground that the matter in suit has been settled since the taking of the appeal, when the affidavits in relation to the fact of settlement do not fully satisfy the court that such settlement has been made. *Lewis v. Tilton*, 100.
7. NO REVERSAL FOR NOMINAL DAMAGES. Where an error on the trial of a cause works only nominal damages to appellant, a reversal will be denied. *Watson v. Van Meter*, 43 Iowa, 76, followed. *Wire v. Foster*, 114.
8. CAUSE REVIEWED AS TRIED BELOW. Where in the court below the defendant filed an answer denying each allegation of the petition, and afterwards the plaintiff amended his petition, and the court and the parties agreed in considering the denials of the answer as applying to the amendment as well as to the original petition, this court will also regard the allegations of the amendment as being put in issue by the answer, though no additional answer was filed. *Id.*
9. ASSIGNMENT OF ERROR. Where it was assigned as error that the court erred in overruling a motion to vacate a judgment on the ground of irregularities, although several of these irregularities were specified as grounds of the motion, yet, as only one ground was relied on, the assignment was sufficiently specific. *Thomas v. Hoffman*, 125.
10. ABSTRACT NOT DENIED. The statements of an abstract which is not denied will be taken as true. *Silcott v. McCarty*, 161.
11. ERROR NOT URGED IN ARGUMENT NOT CONSIDERED. A cause will not be reversed on account of an error which, though assigned, is not alluded to in the argument. *Beeson v. C., R. I. & P. R'y Co.*, 173.

12. PAPERS FILED TOO LATE: COSTS. Where an amended abstract and argument were filed after the time agreed upon by the parties, the court overruled a motion to strike them from the files, but taxed the costs of printing them to the delinquent party. *Keegan v. Estate of Malone*, 208. See 23, *post*.
13. RULINGS NOT EXCEPTED TO IN TIME NOT REVIEWED. Rulings upon instructions which are not excepted to within the time prescribed by statute will not be reviewed. *Ewaldt v. Farlow*, 212.
14. EVIDENCE NOT PRESERVED STRICKEN OUT. Where no bill of exceptions is found of record in the court below, and it is doubtful whether or not any such bill was ever filed there, a motion to strike the evidence from the abstract, on the ground that it was not preserved by a bill of exceptions, must be sustained. *Morris v. Steele*, 228.
15. LOST RECORDS. Lost records in the court below cannot be supplied by affidavits in this court. *Id*.
16. RECORD FOLLOWED. A position taken in argument in a law case, which does not pertain to, and is not based upon, any ruling of the court below, as shown by the record, will not be considered. *Stange v. City of Dubuque*, 303.
17. EFFECT OF AMENDED ABSTRACT BY APPELLEE. Where appellant's abstract claims to contain all the evidence, but appellee denies this claim, and files an amended abstract containing evidence, without admitting that therewith all the evidence is brought before the court, the court will nevertheless, under rule 20, consider all the evidence to be thus supplied, and will proceed accordingly. *McArthur v. Linderman*, 307.
18. QUESTION NOT RAISED BELOW. An objection to evidence as being secondary cannot be made for the first time in this court. *B., C. R. & N. R'y Co. v. Sherwood*, 309.
19. OBJECTIONS NOT MADE BELOW NOT CONSIDERED. Objections to the admission of testimony not made in the trial court cannot first be urged on appeal to this court. *Davidson v. Dwyer*, 332.
20. REVIEW OF ORDER EXCLUDING QUESTION TO WITNESS: RULE STATED. The action of the trial court in excluding a question propounded to a witness will not be reviewed, unless it is made to appear of record what evidence was sought to be elicited by the question. If this appears from the question itself, it is sufficient; if not, the party propounding the question must state what he expects to prove. *Mitchell v. Harcourt*, 349. See 39 *post*.
21. OBJECTION TOO LATE. The insufficiency of a petition in a law action cannot for the first time be raised in this court. *Staples v. Plymouth County*, 364.
22. CASE CONSIDERED AS MADE BELOW. Where, without objection on the part of any one, the sufficiency of a petition was tried below upon a motion to strike it out, instead of upon a demurrer, and the cause is in the same way presented here on appeal, it will be considered as presented, and tried upon its merits. *Rhoadabeck v. Blair Town Lot & Land Co.*, 368.
23. THEORETICAL AND CONTINGENT QUESTIONS NOT CONSIDERED. Where the granting of an order was premature, on account of the pendency of another cause between the parties, the determination of which in appellee's favor would have rendered the order right, and it did not appear whether that cause had been tried or not at the time of the appeal,

held that this court could not say that appellant was prejudiced by the issuance and execution of the order, and that it would not reverse the cause without a showing of prejudice. *Id.*

24. **FINDING OF TRIAL COURT CONSIDERED AS VERDICT OF JURY.** The finding of facts by the trial court in a law action is regarded by this court as the verdict of a jury, and will not be set aside where the evidence is conflicting. *Harris v. Heackman*, 411.
25. **EVIDENCE NOT IDENTIFIED.** The only way oral evidence introduced on the trial of a cause can be preserved and identified, for the purpose of an appeal to this court, is by a bill of exceptions signed by the trial judge; and certain alleged evidence in this case, not being so identified, cannot be considered. *State v. Hemrick*, 414.
26. **PRESUMPTION IN FAVOR OF INSTRUCTION.** Where an instruction in a criminal cause was good in the case of certain possible defenses, but it does not appear from the record what the defense was, this court cannot presume that the instruction was improperly given. *Id.*
27. **VERDICT: EVIDENCE TO SUPPORT: DEFECTIVE ABSTRACT.** This court cannot consider whether or not a verdict is supported by the evidence, where the evidence is not all before the court; and the printing in the abstract of the certificate of the judge, showing that all the evidence is preserved of record, is not of itself sufficient to show that the abstract sets out all the evidence. *Porter v. Stone*, 442.
28. **ABSTRACT FILED TOO LATE: COSTS.** Where an amended abstract is filed too late under the rules, it will not be stricken from the files, but no costs on account thereof will be taxed against the other party. *Cruver v. The C., M. & St. P. R'y Co.*, 460. See, also, 12 *ante*.
29. **OBJECTION TO DEPOSITION: MADE TOO LATE IN THIS COURT.** See Depositions, 4.
30. **EXCEPTIONS NOT TAKEN IN TIME NOT CONSIDERED.** See Exceptions, 1.
31. **BILL OF EXCEPTIONS: CORRECTION OF ERROR IN.** When a bill of exceptions is signed and filed, it becomes a part of the record, and it cannot be contradicted by another certificate signed by the judge and filed as a part of an amended abstract. *Dedric v. Hopson*, 562.
32. **TRANSCRIPT IMMATERIAL WHERE ABSTRACTS ARE COMPLETE.** Where the abstract and amended abstract present all that is required to determine the questions raised, the transcript is superfluous, and a motion to strike it from the files, because not complete, will be overruled. *Id.*
33. **TRANSMISSION OF TRANSCRIPT: REGULARITY PRESUMED.** A transcript found upon the files of this court will, in the absence of satisfactory evidence to the contrary, be presumed to have come here in the way prescribed by statute; and the certificate of the clerk of the lower court that he delivered the transcript to the appellant's attorneys, without more, does not furnish such evidence. *Id.*
34. **ASSIGNMENT OF ERRORS: DEGREE OF PRECISION REQUIRED.** Where the assignment of errors clearly indicates the instructions asked and refused, and that the court erred in refusing them, this is sufficient, without pointing out more particularly the error in the ruling. *Schaefer v. C., M. & St. P. R'y Co.*, 624.
35. **REVIEW OF EQUITY CASE UPON ERRORS.** Where upon the trial of an equity case the court errs in overruling a motion to suppress a deposition taken without authority of law, and, upon an appeal of the cause to this court, such ruling is assigned as error, this court cannot, on account

of the condition of the evidence, try the cause *de novo* upon its merits, but will review it upon the error assigned, and remand it to the court below. *Kershman v. Swehla*, 654.

36. RULINGS NOT APPEALED FROM NOT CONSIDERED. Errors in rulings not appealed from cannot be considered in this court. *Id.*
37. OBJECTION TOO LATE. A discrepancy between the allegations and the proof cannot be urged for the first time in this court. *Iselin v. Griffith*, 668.
38. EVIDENCE: ERROR IN EXCLUDING: CORRECTION ON APPEAL. Where evidence of a conversation was excluded, and the abstract fails to show what facts were sought to be established thereby, this court cannot say that the proposed evidence was material, nor that there was error in excluding it. *Votaw v. Diehl*, 676. See 39, *post*.
39. EVIDENCE: ERROR IN EXCLUDING: CORRECTION ON APPEAL. Where it is apparent upon the face of a question what the evidence sought to be introduced is, and that it is material, this is sufficient to secure a review, on appeal, of the ruling of the court sustaining an objection to the question; but, where this is not apparent, the party seeking to introduce the evidence is required to state what he expects to prove, and thus make its materiality appear of record. *Id.* See 20, *ante*.
40. ERRORS MUST BE SHOWN IN RECORD. Rulings complained of in argument, but which do not appear in the record, cannot be reviewed. *Id.*
41. ON TRIAL DE NOVO: WHAT QUESTIONS TRIED. Where a case is triable *de novo* in this court, all questions may be presented which legitimately arise upon the record, whether urged in the court below or not. *Seymour v. Shea*, 708.
42. FAILURE TO ASSIGN ERRORS: OBJECTION WAIVED. Where appellant fails to assign errors, the appellee, if he desires to take advantage of this failure, must do so at the proper time, and when, as in this case, he does not raise the objection until after the argument of the cause upon its merits, he will be deemed to have waived his right to object. *Andrews & Smith v. Burdick & Goble*, 714.
43. TRIAL DE NOVO UPON AGREED STATEMENT OF FACTS. Where by the agreement of the parties the facts in an equity cause are reduced to a statement in writing, such statement takes the place of the depositions, or the oral testimony reduced to writing, as contemplated in section 2742 of the Code, and a cause tried in the court below upon such a statement is triable *de novo* in this court. *Williams v. Wells*, 740.
44. RECORD INSUFFICIENT: JUDGMENT AFFIRMED. *Duke v. Baugh*, 756; *City of Knoxville v. Foster*, 757.
45. QUESTIONS CERTIFIED NOT INTELLIGIBLE: APPEAL DISMISSED. *Bower v. Kavanaugh*, 756.
46. RECORD INCOMPLETE: APPEAL DISMISSED. *State v. Quigley*, 757.
47. NO BRIEF OR ARGUMENT BY APPELLANT: APPEAL DISMISSED. *Cline v. Phipps*, 758.

PRESUMPTION.

1. IN FAVOR OF RECORD OF TOWN COUNCIL. See *Cities and Towns*, 6.
2. OF GUILT: FROM BAD ASSOCIATIONS. See *Criminal Law*, 8.

3. IN FAVOR OF REGULARITY OF TAX RECORDS. See Evidence, 14.
4. THAT DEED WAS DELIVERED TO GRANTEE THIRTY SECONDS BEFORE IT WAS FILED FOR RECORD. See Assignment for Benefit of Creditors, 1.
5. THAT SERVICES RENDERED BY MEMBER OF FAMILY ARE GRATUITOUS. See Domestic Relations, 1.
6. IN FAVOR OF JUDGMENT OF DISTRICT COURT. See Judgment and Decree, 5.
7. AS TO PRIORITY OF CHATTEL MORTGAGE. See Chattel Mortgage, 2.
8. IN FAVOR OF SHORT-HAND REPORTER'S NOTES. See Short-hand Reporter, 1, 2.
9. IN FAVOR OF CORRECTNESS OF INSTRUCTION. See Practice in Supreme Court, 26.
10. AGAINST PRISONER FAILING TO PRODUCE TESTIMONY IN HIS OWN DEFENSE. See Criminal Law, 23.

PRINCIPAL AND AGENT.

See AGENT AND AGENCY.

PRINCIPAL AND SURETY.

See SURETY.

PROMISSORY NOTE.

1. DELIVERY TO PAYEE WITHOUT AUTHORITY: RIGHTS OF PARTIES. Where defendant executed notes and a mortgage for the purchase price of land bought of plaintiff through his agent, but, immediately upon the exchange of the securities for the deed, defendant objected to the deed, because it was not a deed of general warranty, whereupon it was agreed that plaintiff's agent should hold the notes and mortgage, and that he should procure a regular warranty deed for the defendant, but he failed to procure such deed, and delivered the securities to plaintiff, *held* that plaintiff had no right to the securities, and that his action to foreclose the mortgage was properly dismissed. *Ware v. Smith*, 159.
2. ALTERATION: BURDEN OF PROOF. A defendant who admits the execution of a promissory note sued on, but alleges that it has been altered since its execution, has the burden of proof to establish the alteration. *Odell v. Gallup*, 253.
3. CHANGE OF TIME OF PAYMENT: STATUTE OF LIMITATIONS. Where one of the makers of a note, several months after its execution, with the oral consent of his co-makers, made and signed an indorsement on the back of the note, whereby it was to become due at a date earlier than that named on its face, *held* that the indorsement was the act only of him who made it, and that the co-makers who consented to his making it did not become parties thereto in such sense as to cause the statute of limitations to run against the note, as to them, from the date named in the indorsement. *Mitchell v. McHenry*, 352.
4. FRAUD AND CONSPIRACY IN OBTAINING SIGNATURE OF MAKER. Where plaintiff was prosecuting a suit for damages against two defendants for fraud in imposing upon and selling to him a worthless patent right, and, pending the suit, plaintiff's attorneys entered into an agreement with one of the defendants, whereby he, while pretending to be a defendant, was to assist in the prosecution of the suit, and was to share the amount.

which should be recovered, and, under such arrangement, said defendant betrayed his co-defendant into executing with him a joint promissory note to plaintiff in settlement of the suit, *held* that plaintiff, if he knew at the time of the conspiracy by which the note was procured, or afterwards knowingly ratified it, could not profit by the transaction, and could not recover on the note as against the betrayed defendant. *Mitchell v. Donahey*, 376.

5. ———: FRAUD OF ATTORNEY AS AFFECTING CLIENT. In such case, if plaintiff was innocent of the fraud and conspiracy practiced by his attorneys, he would not be bound thereby, and he would be entitled to recover upon the note as against both defendants, unless it should be shown that the suit, in settlement of which the note was given, was founded upon no valid claim, and that the note was thus without consideration. *Id.*
6. PROCURED BY UNDUE INFLUENCE UPON FEEBLE MIND: SET ASIDE. See Contracts, 19.

PUBLIC LANDS.

See GOVERNMENT LANDS.

RAILROADS.

1. RIGHT OF WAY: DAMAGES. Where a railway company, in laying its road across a farm, destroys a valuable spring, that fact should be considered in estimating the damages, and evidence as to the character of the spring, and of its destruction, is admissible. *Winklemans v. The Des Moines & Northwestern R'y Co.*, 11.
2. ———: ———: WHOLE FARM TO BE CONSIDERED. On a question of damages caused to a body of land used, improved and occupied as one farm, by the construction of a railroad across the same, the whole farm must be considered, and testimony offered as to the damage to separate portions of the farm was properly excluded. *Id.*
3. ———: ———: EVIDENCE. A witness who is called to testify as to the damages to a farm, arising from the taking of a portion of it for railway purposes, may testify as to what other lands sold for in the same neighborhood, for the purpose of showing his knowledge of the value of land in that vicinity; and, for the same purpose, he may state what he has heard others say concerning sales of land made by them. *Id.*
4. ———: ———: ———. On the trial of such question, it was not competent to ask the commissioners, who had assessed the damages in the first instance, whether their assessment correctly expressed their judgment; but they might be asked for their judgment at the time of the trial on appeal. *Id.*
5. ———: ———: ———. Where a spring was destroyed by a right of way taken for a railway, it was not error, in a trial of the question of damages to the land, to allow one of the company's witnesses, who had testified to the damage, to be asked on cross-examination how much damage the destruction of a spring of a certain capacity would be to the land. *Id.*
6. ———: ———: PRACTICE: SPECIAL INTERROGATORIES. In submitting to a jury a cause involving the damages caused by taking the right of way through a farm for a railroad, the court properly refused to permit special interrogatories asking the opinion of the jury as to the damages to separate parts of the farm, and other interrogatories which related to questions not involved in the case. *Id.*

7. ———: EXTENT OF RIGHT: STATUTE CONSTRUED. The restriction as to what is "necessary," in section 1244 of the Code, applies to the quantity of land to be taken for right of way, and not to the quantity of earth, gravel, stone, timber, etc., which may be removed from the land condemned. But the railroad company may not wantonly destroy timber, or use earth, etc., for other purposes than those provided in the statute. *Id.*
8. INJURY TO BRAKEMAN: NEGLIGENCE IN "BACKING" TRAIN. Where a brakeman, when about to make a coupling, was authorized by the custom in such cases to believe that the train would not be "backed" until he was ready and should so signal, it was negligence in those in charge of the train to "back" it without such signal. *Romick v. C., R. I. & P. R'y Co.*, 167.
9. PERSONAL INJURY: EJECTMENT FROM PASSENGER STATION. It appears from the evidence in this case that plaintiff was a woman of ill-repute, and had on prior occasions conducted herself about the defendant's passenger station in a lewd and indecent manner, and that, in the evening of a certain day, at a time when, by the defendant's rules, the ladies' waiting room was closed, and several hours prior to the departure of the train on which she said she was about to travel, she by some artifice, had gained admission to the waiting room, and that, for misconduct therein, she was removed by the police at the request of defendant's agent, but without any force whatever; and it was held that, if plaintiff was entitled to a verdict at all, it was only for nominal damages, and that a verdict for \$175 should be set aside. *Beeson v. C., R. I. & P. R'y Co.*, 173.
10. RIGHT OF WAY DEED: COMPLIANCE WITH CONDITIONS OF ESSENTIAL. Where plaintiffs conveyed to a railway company the right of way over their land, in consideration of the location and construction of a railway along a contemplated line, held that the grantee of said company could not, by virtue of such conveyance, use such right of way for a line of railway which did not conform in substance to such contemplated line, but which ran in a different direction. *Crosbie v. Chicago, Iowa & Dakota R'y Co.*, 189.
11. RIGHT OF WAY: DAMAGES: EVIDENCE. The land in question was not a desirable tract, was situated more than two miles beyond the limits of the city of Des Moines, and was approached from the city by way of Greenwood Avenue, but lay more than a mile from that avenue, and eighty rods south of the line of the avenue extended westward. On the question of damages to plaintiff caused by taking the right of way over the land, held that evidence to the effect that Greenwood Avenue was a good road by which to approach the land was proper, but that evidence as to the superior character of the improvements upon said avenue was not proper to be admitted, it not appearing that the land is likely to be in demand in the near future for residence purposes. *LaMont v. St. L., Des M. & N. R'y Co.*, 193.
12. NEGLIGENCE IN REPAIRING CARS: EVIDENCE OF CUSTOM. Evidence as to the time when railway companies usually replace certain portions of their machinery is immaterial, when it is not shown that the custom has any relation to the avoidance of the kind of injury complained of. *Kitteringham v. Sioux City & Pac. R'y Co.*, 285.
13. INJURY TO EMPLOYEE: CONTRIBUTORY NEGLIGENCE: MEANS OF KNOWLEDGE. Where an employee of a railway company knew, or by the exercise of reasonable care could have known, of the company's negligence, whereby he claims to have been injured, and of which he complains, he was guilty of contributory negligence in incurring the danger, and he cannot recover for the injury so sustained. *Id.*

14. ———: INSTRUCTION. Where the evidence tended strongly to show that the injury complained of was the result, not of defendant's negligence, but of an ordinary cut, aggravated by a depraved condition of plaintiff's system, the court properly instructed that plaintiff could not recover, if the jury found that plaintiff's injury occurred by reason of the impurity of his blood. *Id.*
15. NEGLIGENCE: MEANS OF KNOWLEDGE. Where nothing has ever occurred to suggest to a railway company that there is any danger in a certain line of conduct, the company cannot be said to have had such means of knowledge of the alleged danger as to render it negligent in continuing in that line. *Id.*
16. DUTY IN REGARD TO STOCK RUNNING AT LARGE. A railroad company is under no obligation to provide places for stock to leave its track. *Gilman v. Sioux City & Pac. R'y Co.*, 299.
17. ON CITY STREETS: POWER OF CITY ACTING UNDER SPECIAL CHARTER: COMPENSATION TO LOT OWNERS. See Cities and Towns, 10.
18. ON CITY STREETS: DAMAGES TO LOT OWNERS: EVIDENCE. In an action against a city to recover damages for allowing a street to be used for railway purposes without compensation to the owners of abutting lots, evidence that, by the operation of the railway travel had been diverted from the street, was admissible, for the purpose of showing that the rental value of property on that street had been diminished. *Stange v. City of Dubuque*, 303.
19. VIOLATION OF RAILROAD TARIFF LAW: PARTIES EQUALLY GUILTY: NO RECOVERY. See Contract, 15.
20. RIGHT OF LAND-OWNER TO OPEN CROSSING: BURDEN TO ESTABLISH. A farmer is not, as a matter of course, entitled to an open crossing for his stock over the track of a railway which traverses his farm, regardless of all other means of crossing; and, before he can demand such open crossing, he must show, at least, that he has no other adequate means for transferring his stock from one side to the other of the track. The plaintiff having failed to bring up all his evidence on this appeal, this court cannot say that the court below erred in finding that he was not entitled to the open crossing demanded by him. *Curtis v. The C., M. & St. P. R'y Co.*, 418.
21. CONDEMNATION OF RIGHT OF WAY: JURISDICTION OF SHERIFF'S JURY: CERTIORARI. A sheriff's jury has no jurisdiction in proceedings to condemn right of way for a railroad, unless the owner refuses to grant the right of way, or the parties are unable to agree upon the compensation to be paid therefor. Code, § 1244. Consequently, where the owner had conveyed the right of way to the railway company, though by a deed which he was seeking to have set aside in equity, since the deed, until set aside, vested the title *prima facie* in the railway company, the proceedings of the sheriff's jury, called out upon the owner's motion, were without authority, and were properly set aside on *certiorari*. *Council Bluffs & St. L. R'y Co. v. Bentley*, 446.
22. CUSTOM TO BLOCK FROGS: NEGLIGENCE: EVIDENCE. Where the negligence complained of was that defendant had failed to block a frog in its track, it was proper to allow plaintiff to prove (without avering it in his petition) an order and custom on the part of defendant to block all frogs along its lines, for the purpose of showing an admission that frogs unprotected are dangerous to employees. *Coates v. The B., C. R. & N. R'y Co.*, 486.
23. DEATH THROUGH NEGLIGENCE: LIFE TABLES AS EVIDENCE. The standard tables, showing the life expectancy of people of different ages,

have been too long conceded to be competent evidence in cases of permanent personal injuries to railway operatives to be even questioned. *Id.*

24. **INJURY TO EMPLOYEE: EMPLOYEE'S KNOWLEDGE OF THE DANGER: BURDEN OF PROOF.** In an action for personal injury through the negligence of a railway company, where the defendant has shown that the plaintiff knew of the dangerous condition of the road or machinery which he aided to operate, it is then incumbent on the plaintiff to show that he was in some manner justifiable in exposing himself to the danger, before he can recover. And the rule is not different when the injury results in death, and the action is brought by the administrator. *Id.*
25. **PERSONAL INJURY: MEASURE OF DAMAGES: INSTRUCTIONS TOO GENERAL.** In such case, an instruction to the jury that "the measure of damages will be such sum, not to exceed the amount claimed, as they may find from the testimony in the case will compensate for the loss sustained by the injuries, taking into consideration all the testimony having a bearing thereon," was not sufficiently explicit. For the elements of damages in such a case, see *Donaldson v. Railroad Co.*, 18 Iowa, 280. *Id.*
26. **RIGHT OF WAY: CONDEMNATION BY THIRD PERSON UNDER CONTRACT: RIGHTS OF THE PUBLIC: GARNISHMENT.** Where a railroad company contracted with a person to furnish at a given sum per mile its right of way at his own expense, purchasing and condemning in the name of the company, *held* that the public and land-owners were not bound to take any notice of the intermediate contractor, but that as to them the company was the only responsible party; and where a right of way had been condemned by the contractor, and the award paid to the sheriff, but the land-owner had taken an appeal, and the company had been garnished by a judgment creditor of the land-owner, *held*, further, that the contractor was bound to take notice of the garnishment, and his payment of an additional sum to the land-owner in settlement of the appeal, and for a deed for the right of way in question, did not exonerate the company from liability as garnishee to account for the additional sum so admitted to be due to the land-owner, and judgment in this case was properly rendered against it as garnishee for such sum. *Buchanan County Bank v. C. R., I. F. & N. W. R'y Co.*, 494.
27. **RIGHT TO FENCE TRACK WITHIN TOWN OR CITY LIMITS: LIABILITY FOR INJURY TO STOCK.** A railroad company has the same right to fence its right of way over land which lies within the corporate limits of a city or town, but outside of or beyond streets or alleys or other public highways, as if the corporation did not exist, unless, possibly, such right may be controlled by a municipal ordinance; and, where a company fails to fence its track at such a place, it becomes liable to the owner of any stock injured or killed by reason of the want of such fence. Code § 1289. *Coyle v. The C., M. & St. P. R'y Co.*, 518.
28. **FIRE BY SPARKS FROM ENGINE: PRIMA FACIE EVIDENCE OF NEGLIGENCE.** Under the last clause of section 1289 of the Code, the fact of an injury resulting from fire caused by sparks escaping from an engine is *prima facie* evidence of negligence, which the defendant must rebut. *Small v. The C., R. I. & P. R'y Co.*, 50 Iowa, 333, followed. *Babcock v. C., R. I. & P. R'y Co.*, 593.
29. —: **NEGLIGENCE: CIRCUMSTANTIAL EVIDENCE TO PROVE.** The doctrine announced in *Gandy v. The C. & N. W. R'y Co.*, 30 Iowa, 420, that the fact of negligence on the part of a railway company, in setting out a fire by sparks from an engine, may be established by circumstantial evidence, *held* to apply as well where the testimony is offered by way of rebuttal, as where it is produced in making out the case in chief; and

such evidence so introduced in this case was properly submitted to the jury. *Id.*

30. ———: EVIDENCE. From the fact that some of the conditions under which two fires set out at about the same place by sparks from a locomotive engine, one of which caught within the right of way of the defendant, were the same, it cannot be inferred that the other fire also caught within the right of way, and the admission of evidence of the similarity of such conditions for the purpose of raising such inference was erroneous. *Id.*
31. ———: NEGLIGENCE: CONFLICT IN EVIDENCE: WHAT CONSTITUTES. In an action against a railway company for damages caused by the negligence of the defendant in setting out a fire by sparks from its engine, the occurrence of the fire is, under the statute and the decisions of this court, *prima facie* evidence of negligence on the part of defendant. With this *prima facie* evidence on one side, and the direct evidence of defendant on the other side that it was not negligent, there arises a conflict, which it is the duty of the court to submit to the jury. Much more does such a conflict arise where, as in this instance, the *prima facie* case made by the occurrence of the fire is corroborated by circumstantial evidence of the defendant's negligence. *Id.*
32. COLLISION AT HIGHWAY CROSSING: CONTRIBUTORY NEGLIGENCE DEFEATS RECOVERY. In an action for damages caused by a collision of defendant's train with plaintiff's team at a highway crossing, although defendant may have been negligent in not giving the usual signals, yet plaintiff cannot recover, if the negligence of the person driving the team contributed materially to the accident. *Schaefer v. The C., M. & St. P. R'y Co.*, 624.
33. ———: CONTRIBUTORY NEGLIGENCE: ACTS CONSTITUTING. Where a person traveling on a highway, and approaching a known crossing of a railway track, with knowledge that the view of an approaching train is to an extent obstructed, heedlessly permits his team to trot over the highway, and makes no effort to look or listen for an approaching train for a distance of eighteen rods from the track, he is guilty of such contributory negligence as will prevent him from recovering, if a collision occurs, provided there are no circumstances which are calculated to distract his attention. *Id.*
34. SOUNDING WHISTLE AT CROSSING: NEGLIGENCE. Where an engineer is approaching a highway crossing with his train at a rapid rate, and, when near the crossing, but as soon as it is possible, he sees a team approaching the track, and that a collision will certainly occur unless something is done immediately to prevent it, the natural and usual thing to do is to sound the whistle, and in so doing he is not guilty of negligence, though the sound of the whistle, by frightening the horses, may possibly contribute to the collision. *Id.*
35. RISKS ASSUMED BY EMPLOYEES: DANGERS FROM SNOW BANKS. Railroad employes assume the risk of all dangers necessarily attendant upon the operation of the roads. Among these dangers are those arising from snow and its removal from the track in the usual manner—by the use of snow plows, and an employe who is injured by a snow bank, made along the track by the ordinary use of a snow plow, cannot recover for such injury, and the company cannot be charged with negligence on account thereof. *Dowell v. B., C. R. & N. R'y Co.*, 629.
36. PERSONAL INJURY: RIDING IN FREIGHT CAR: CONTRIBUTORY NEGLIGENCE. Where one, having cattle on the train, has time to get aboard the "caboose," but fails to do so, and boards a freight car and rides therein, by reason of which fact he is injured, he is guilty of such contribu-

tory negligence as will defeat his recovery for such injury, notwithstanding the railway employes may have been negligent in not bringing the "caboose" within a reasonable distance of the depot. *Player v. B., C. R. & N. R'y Co.*, 723.

37. **PERSONAL INJURY TO EMPLOYEE: RECOVERY AGAINST RECEIVER: STATUTE CONSTRUED.** A receiver, who is operating a railroad under the appointment and direction of a court, is included under the terms, "persons owning or operating railways," in contemplation of § § 1278, 1307 of the Code; and such receiver, or rather the property in his hands, is liable for the claim of an employe for injuries received through the negligence of co-employes. *Sloan v. Central Iowa R'y Co.*, 728.
38. —: **RECOVERY AGAINST COMPANY TAKING FROM A RECEIVER THE ROAD BURDENED WITH THE LIABILITY.** Where a railroad was for a time operated by a receiver, under the appointment and direction of the United States circuit court, and during this time a claim for damages arose in plaintiff's favor and against the receiver, on account of personal injuries, and the court ordered the railway to be turned over to the defendant, upon condition that it would assume and pay all liabilities incurred while the road was operated by the receiver, and the defendant accepted the property with the conditions attached, *held* that it thereby became liable to the plaintiff on account of his claim for damages, and that an action thereon was properly brought against defendant. *Id.*
39. **PERSONAL INJURY OF BRAKEMAN: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** Whether or not the plaintiff, a brakeman, was guilty of contributory negligence in not taking hold of the brake-rod, or something else, to steady himself, in anticipation of a "jerk," was a question for the determination of the jury from a consideration of all the circumstances. *Id.*
40. **AUTHORITY OF CONDUCTOR TO EMPLOY BRAKEMEN: LIABILITY OF COMPANY.** When a regular brakeman is absent, and the safe and proper management of the train requires it, the conductor has authority to employ a brakeman for the time being, who thereby becomes an employe of the company, and is entitled to recover for injuries received through the negligence of a co-employe. *Id.*
41. **PERSONAL INJURY TO BRAKEMAN: SUNDRY RULINGS OF THE TRIAL COURT CONSIDERED AND APPROVED.** The instructions given by the court, and the rulings upon the admission of evidence, and upon the submission of special interrogatories to the jury, and upon the special findings of the jury, being considered by the court, and found to be in harmony with the views already expressed in this case, are approved. *Id.*

REAL ESTATE.

1. **ACTION AT LAW TO RECOVER: LEGAL TITLE PREVAILS.** See Recovery of Real Property, 1.
2. **TREATED AS PERSONALTY IN EXECUTION OF WILL.** See Will, 10; **IN SETTLEMENT OF PARTNERSHIP.** See Partnership, 4.

RECEIVER.

1. **OF RAILROAD: LIABILITY FOR INJURY TO EMPLOYEE.** See Railroads, 37, 38.

RECOVERY OF PERSONAL PROPERTY.

See REPLEVIN.

RECOVERY OF REAL PROPERTY.

1. ACTION AT LAW: LEGAL TITLE PREVAILS. In an action at law for the recovery of the possession of real estate, where no equitable defense is pleaded, the legal title must prevail. *Gepinger v. Ringland*, 76.

REDEMPTION.

1. FROM FORECLOSURE SALE BY ONE NOT A PARTY: TERMS OF. A junior lien holder, who is not made a party to a foreclosure proceeding, may not only redeem from the sale within the statutory period, but he may afterwards redeem by paying the mortgage debt, with interest and other proper charges; and, if the purchaser at the foreclosure sale has been in possession, the lien-holder may demand an accounting of the rents and profits, and have the same applied on the mortgage debt. *Bunce v. West*, 80.
2. ———: PLEADING: OFFER TO PAY. In such case an offer, in the petition of the lien-holder seeking to redeem, to pay any balance that may be found due from him, is sufficient. *Id.*
3. FROM JUDICIAL SALE: RIGHT OF AS BETWEEN JUNIOR AND SENIOR LIEN-HOLDERS: STATUTORY AND EQUITABLE RIGHT. A junior lien-holder has no right under the statute to redeem property sold at judicial sale after nine months subsequent to the date of sale; but where the sale was under the foreclosure of a mortgage, to which the junior lien-holder was not made a party, he had the right in equity to redeem from the sale, and the mortgagee, who was the purchaser at the foreclosure sale, had the right also to redeem from the junior lien-holder, by paying him the amount upon which his claim was based. *Newell v. Pennick*, 123.
4. ———: RIGHT OF AS BETWEEN JUNIOR AND SENIOR MORTGAGEES: TERMS OF. Where B. mortgaged land to defendant, and afterwards mortgaged the same land to plaintiffs, and defendant, under a foreclosure of his mortgage, to which plaintiffs were not made parties, procured a deed to the land, and afterwards plaintiffs, under a foreclosure of their mortgage, to which defendant was not made a party, also obtained a deed to the land, held that, while plaintiffs' right, as junior mortgagees, to redeem from the senior mortgage, was not cut off by the foreclosure of the senior mortgage, yet that right was not absolute, but that defendants could prevent the exercise of that right by themselves redeeming from the junior mortgage, by paying, not merely the amount for which the land sold on the foreclosure of the junior mortgage, but the amount of plaintiffs' judgment against B. upon the junior mortgage debt. *Smith v. Shay*, 119.
5. FROM MORTGAGE FORECLOSURE SALE: BY JUNIOR LIEN-HOLDER NOT MADE A PARTY: TERMS OF. One who buys property under a mortgage foreclosure holds title thereto, subject to the right of redemption by a junior lien-holder not made a party to the foreclosure, upon his paying to the purchaser the amount of the mortgage debt, interest and costs, and taxes paid by the purchaser, and the value of all improvements made in good faith by the purchaser upon the premises, less the rents and profits of the premises while in the possession of the purchaser. But the purchaser may, before redemption, remove improvements made by him, if it can be done without injury to the premises; and in that case he cannot recover their value from the redemptioner, nor can he be com-

pelled to account to the redemptioner for the rents and profits arising from such improvements while remaining on the premises. *Poole, Gilliam & Co. v. Johnson*, 611.

6. **FROM MORTGAGE FORECLOSURE: BY JUNIOR LIEN-HOLDER NOT MADE A PARTY.** A junior lien-holder has in equity a right to redeem from a senior mortgage until that right is cut off by foreclosure, and it is not affected by foreclosure proceedings to which he is not made a party. Such equitable right to redeem is not taken away or abridged by the statute providing for redemption after foreclosure. *Spurgin v. Adamson*, 661.
7. ———: **OF HOMESTEAD BY JUDGMENT CREDITOR.** A mere judgment creditor has no lien upon the debtor's homestead, and he has no right to redeem the same from one who purchases it under the foreclosure of a senior mortgage. *Id.*
8. ———: **TERMS OF.** A junior incumbrancer, in making redemption from a senior mortgage, is required to pay the full amount of the mortgage debt, even though he seeks to redeem but a part of the mortgaged premises. *Id.*
9. **FROM MORTGAGE FORECLOSURE: BY JUNIOR INCUMBRANCER NOT MADE A PARTY: TERMS OF.** One who purchases real estate under the foreclosure of a mortgage, to which a junior incumbrancer was not made a party, holds the property subject to redemption by such junior incumbrancer, and must account for the rents and profits of the premises while enjoyed by him, and is entitled to credit for improvements made and for taxes paid upon the land. *Id.* See, also, Mortgage, 7.
10. **FROM TAX SALE.** See Tax Sale and Deed, 1-4.
11. **FROM TAX SALE: OFFER MADE TOO LATE.** See Tax Sale and Deed, 6.

REFEREE.

1. **PRACTICE BEFORE: PRESERVING EVIDENCE.** See Practice, 3.

REPLEVIN.

1. **ACTION AGAINST SHERIFF WHO HAS PARTED WITH POSSESSION.** Under § 3239 of the Code, an action for the recovery of personal property, wrongfully levied upon and sold by a sheriff to pay another's debt, may be begun and maintained against the sheriff, notwithstanding he may have sold the property and parted with the possession thereof, provided due notice of plaintiff's ownership was served upon him while in possession. *Hardy v. Moore*, 65.
2. **PLAINTIFF MUST SHOW TITLE IN HIMSELF BEFORE DEFENDANT IS PUT TO HIS DEFENSE.** See Fraudulent Conveyance, 7.
3. **AGAINST SHERIFF: SUBSTITUTION OF ATTACHING CREDITOR: STATUTE UNCONSTITUTIONAL.** Where a sheriff levies upon personal property, under a writ of attachment, and the owner of the property replevies it, the attaching creditor cannot be substituted as defedant in place of the sheriff, and the sheriff discharged, under sections 2572, 2573 and 2574 of the Code. Said sections, so far as they provide for such substitution, are unconstitutional. *Sunberg v. Babcock*, 61 Iowa, 601, followed. *Maish v. Littleton*, 105.
4. **OF CORN PURCHASED UNDER CONTRACT: EVIDENCE.** Where plaintiffs entered into a contract to furnish money to defendants wherewith the latter were to buy corn for plaintiffs, and it appeared that the defendants,

when they had bought a crib of corn, would mark the crib with plaintiff's name and draw upon plaintiffs for the cost of the same, accompanying the draft with a receipt for the crib, *held* that the corn thus became the property of plaintiffs, as between them and the defendants, and, in an action between them to recover possession of the corn, it was immaterial that it was bought with defendants' and not with plaintiffs' money, and that defendants had given to others crib receipts for portions of the same corn, and that defendants removed the corn from the cribs for the purpose of shelling and shipping. *Dows & Co. v. Morse & Lilly*, 231.

5. **OF UNDIVIDED INTEREST IN GROWING CROP.** Where chattels of the same nature and quality, belonging to different owners, are mingled in one mass, any owner may claim his share by replevin; but where the property is not susceptible of division, as in the case of a growing crop, replevin will not lie, because the undivided share sought to be recovered cannot be seized and delivered to the plaintiff. *Read v. Middleton*, 317.
6. **WILL NOT LIE WHEN PLAINTIFF IS IN POSSESSION OF THE PROPERTY.** See Execution, 6.

REPORTER.

See SHORT-HAND REPORTER.

RES ADJUDICATA.

See FORMER ADJUDICATION.

ROAD SUPERVISOR.

1. **FAILURE TO ACCOUNT FOR FUNDS: TOWNSHIP TRUSTEES CANNOT MAINTAIN ACTION AGAINST.** See Township Clerk, 1.

ROBBERY.

1. **INDICTMENT FOR: SUFFICIENCY OF.** See Criminal Law, 6.

RULES.

1. **OF SUPREME COURT FOR ADMISSION OF ATTORNEYS TO THE PRACTICE OF LAW IN IOWA, 760.**

SALE.

1. **OF CORN TO BE DELIVERED: ACTION FOR NON-DELIVERY: DEMAND AND TENDER.** Before one can recover damages for the non-delivery of corn contracted for, where no part of the price has been paid, he must tender the contract price and demand the corn. *Wire v. Foster*, 114.
2. **———: ———: MEASURE OF DAMAGES.** Where defendant sold and agreed to deliver to plaintiff at his farm a few miles from S. certain corn, to be paid for when delivered, at the market price, *held* that, since the law presumes that plaintiff could have gone into the market and bought the corn at the market price, he was not damaged by defendant's failure to deliver, (*Boies v. Vincent*, 24 Iowa, 387,) and the fact that the quantity of corn contracted for was not in the market at S., at the time fixed for delivery, is not material. *Id.*
3. **OF LAND BY AGENT: POWER OF AGENT.** See Agent and Agency, 2.
4. **ABSOLUTE ON FACE—MORTGAGE IN FACT: EVIDENCE.** See Bill of Sale, 1.

SALOONS.

1. **ALLOWING MINORS IN: KNOWLEDGE OF PROPRIETOR AS AFFECTING GUILT: LIABILITY FOR OFFENSE OF SERVANT.** See Criminal Law, 15, 16.

SCHOOL DISTRICT.

1. **SUBDIVISION OF: APPORTIONMENT OF ASSETS: RESULTING TRUST.**
When a school district was subdivided, and upon apportionment of the assets it was agreed that certain taxes yet to be collected from territory not included in the plaintiff should be paid, when collected, to the plaintiff, there was no legal difficulty in plaintiff's receiving such payment; and the fact that it did not, and that the money was paid to the district formed out of the territory from which the taxes were collected, did not make the latter district in any sense the trustee of the former. *Dist. Twp. of Jasper v. Dist. Twp. of Wheatland*, 62.
2. **IS MUNICIPAL CORPORATION, AND MAY ISSUE BONDS AS SUCH.** A school district is properly called a municipal corporation, according to the modern use of that term; and, as such, may obligate itself by bonds issued under the provisions of chapter 93 of the acts of the Fourteenth General Assembly. *Curry v. Dist. Twp. of Sioux City*, 102.
3. **BOUNDARIES: POWER OF COUNTY SUPERINTENDENT TO CHANGE.** A county superintendent of schools has no authority to detach territory from one independent school district and annex it to an adjoining one, unless, by reason of streams or other natural obstacles, the inhabitants of the territory so detached cannot, with reasonable facility, enjoy the advantages of the schools in the district from which the territory is sought to be detached, nor unless the directors of the district to be deprived of the territory consent to the change. *Ind. Dist. of Union v. Ind. Dist. of Cedar Rapids*, 616.
4. **CHANGE OF BOUNDARY: VOID ORDER OF COUNTY SUPERINTENDENT: CURATIVE ACT OF LEGISLATURE: HOW FAR VALID.** The legislature may by a curative act validate a void order of a county superintendent changing the boundaries of school districts, in a case where a general law could not be made to apply—following *State v. Squires*, 26 Iowa, 340; but such act cannot be allowed to operate to deprive a school district, from which territory is detached by such order, of taxes which are levied and collectible before the curative act is passed; for, under the doctrine of *City of Dubuque v. Ill. Cent. R. Co.*, 39 Iowa, 56, such district has acquired in such taxes a vested right, of which it cannot constitutionally be deprived. *Id.*

SCHOOL FUND.

1. **MORTGAGE TO: SUBSEQUENT TAXES: PRIORITY OF LIEN.** Where land mortgaged to the school fund was afterwards sold for taxes subsequently accruing, the mortgage lien was superior to that of the holder of the tax sale certificate, and, where such holder was made a party to an action to foreclose the mortgage, he had a right, under the statute, to redeem from the foreclosure sale, but, having failed so to do, his interest ceased, and the execution to him of a tax deed was properly enjoined. *Ritchie v. McDuffie*, 46.

SERVICES.

1. **ACTION FOR COMPENSATION: EVIDENCE.** See Evidence, 9.
2. **RENDERED BY MEMBER OF FAMILY PRESUMED TO BE GRATUITOUS.** See Domestic Relations, 1.

SHERIFF.

1. ACTION AGAINST TO RECOVER PERSONAL PROPERTY WRONGFULLY LEVIED UPON AND SOLD. See *Replevin*, 1.
2. LIABILITY OF FOR FAILURE TO SELL PROPERTY AFTER BEING INDEMNIFIED. See *Execution*, 6.

SHORT-HAND REPORTER.

1. NOTES OF: PRESUMED TO BE FILED: PURPOSE OF LONG-HAND EXTENSION. See *Practice*, 6.
2. ———: PRESUMPTION IN FAVOR OF. Where the trial judge certified on a certain date that the attached reporter's notes contained all the evidence introduced or offered, and judgment was not rendered until some months afterwards, it will not be presumed, in the absence of a showing, that any other evidence was offered after the certificate was made. *Royer v. Foster*, 321.

SPECIFIC PERFORMANCE.

1. SALE OF LAND: FACTS NOT JUSTIFYING DECREE. See *Attorney in Fact*, 1.

STARE DECISIS.

1. APPLICATION OF RULE TO INSTRUCTIONS IN MURDER CASES. See *Criminal Law*, 31.

STATUTES.

1. REPEAL OF BY ENACTMENT OF CODE OF 1873. All public and general statutes passed prior to the enactment of the Code of 1873, and not reenacted, were repealed thereby; (Code, § 47;) and section 8, chapter 107, Acts of the Eleventh General Assembly, was thus repealed. *Staples v. Plymouth County*, 364.

STATUTES CITED, CONSTRUED, ETC.

CODE OF 1831.

- Secs. 691, 708. Religious corporations: Duration of. *Byers v. McCartney*, 311.
 " 2712. Houses of ill-fame. *State v. Probusco*, 403.

REVISION OF 1863.

- Sec. 784. Contesting tax title: Evidence. *Hintrager v. Kiene*, 603.
 " 1158, 1187. Religious corporations: Duration of. *Byers v. McCartney*, 341.

LAWS OF 1866.

- Chap. 107, Sec. 8. Boards of health. *Staples v. Plymouth Co.*, 367.

LAWS OF 1870.

- Chap. 54. County bonds. *Curry v. Dist. Twp. of Sioux City*, 104.
 " 167. Statute of limitations. *Goodnow v. Stryker*, 234.

LAWS OF 1872.

- Chap. 87. School districts. *Curry v. Dist. Twp. of Sioux City*, 103.
 " 98, Sec. 4. Service on corporation. *Philip v. Covenant Mut. Ben. Assn.*, 636.

CODE OF 1873.

- Sec. 47. Repeal of prior statutes. *Staples v. Plymouth County*, 368.
 " 163. Jurisdiction of circuit court. *Schuchtert v. Lamney*, 197.
 " 200. Bill of exceptions: Appearance docket. *Royer v. Foster*, 328.
 " 308. Care of county property. *Cail v. Hamilton County*, 449.
 " 415-420. Board of health. *Staples v. Plymouth County*, 365 et seq.
 " 464. Railways on streets. *Stange v. City of Dubuque*, 305 et seq.
 " 484. Assessment by city. *Cassady v. Hammer*, 366.
 " 521. Board of health. *Staples v. Plymouth County*, 365 et seq.

- Sec. 573, 531. Elections. *State v. Phippen*, 53.
- " 789. Taxation: Exemption for fruit trees. *Shiner v. Jacobs*, 893.
- " 857. Payment of taxes. *Ritchie v. McDuff*, 47.
- " 882. Township assessor. *State v. Phippen*, 55.
- " 891. Tax deed: When due. *Ellsworth v. Low, Adams & French*, 179; *Long v. Smith*, 331.
- " 896. Tax deed: Evidence. *Ellsworth v. Low, Adams & French*, 179.
- " 837. Contesting tax title: Evidence. *Hininger v. Kiene*, 608.
- " 905. Record evidence. *Ellsworth v. Low, Adams & French*, 181.
- " 969-1000. Township trustees: Road taxes. *Keller v. Bare*, 469.
- " 936. Road supervisors: Settlement with. *Keller v. Bare*, 469.
- " 1063. Corporations: Capital stock. *Goff v. Hawkeye Pump and Windmill Co.*, 914.
- " 1069. Religious corporations: Duration of. *Byers v. McCartney*, 341.
- " 1089. Corporations: Illegal organization. *Quinn v. Shields*, 138.
- " 1091. Religious corporations. *Byers v. McCartney*, 341 *et seq.*
- " 1091-1102. Charitable corporations. *Quinn v. Shields*, 131 *et seq.*
- " 1093. Charitable corporations. *Quinn v. Shields*, 137.
- " 1097. Religious corporations. *Bird v. St. Mark's Church*, 574.
- " 1101. Religious corporations. *Byers v. McCartney*, 342.
- " 1165. Insurance companies. *Philp v. Covenant Mut. Ben. Assn.*, 634.
- " 1224. Condemning right of way: Jurisdiction. *Council Bluffs & St. L. R'y Co. v. Bentley*, 447.
- " 1241. Right of way. *Winklemans v. Des M. N. W. R'y. Co.*, 20.
- " 1278-1307. Railroads: Injury to employes. *Sloan v. Cent R'y of Iowa*, 732.
- " 1289. Railroads: Injury to stock. *Giltman v. Sioux City & Pac. R'y Co.*, 300; *Coyle C. M. & St. P. R'y Co.*, 519; Fire from engine. *Babcock v. C. & N. W. R'y Co.*, 695.
- " 1357, 1359, 1359. Paupers: Liability of county. *Winneshiek County v. Allamakee County*, 561.
- " 1418. Insane persons: Jurisdiction. *Winneshiek County v. Allamakee County*, 561.
- " 1497. Removing fences: Notice. *Devore v. Ellis*, 507.
- " 1543, 1558. Sale of intoxicating liquors. *State v. Probasco*, 403.
- " 1558. Sale of intoxicating liquors. *Loan v. Etzel*, 432.
- " 1797. School districts: Boundaries. *Ind. Dist. of Union v. Ind. Dist. of Cedar Rapids*, 618.
- " 1806. Independent districts: Laws governing. *Ind. Dist. of Union v. Ind. Dist. of Cedar Rapids*, 618.
- " 1983. Estates in futuro. *Leaver v. Gauss*, 316.
- " 1934. Resulting trusts. *Sleeper v. Iselin*, 534.
- " 1993. Judicial sale of homestead. *Equitable Life Ins. Co. v. Gleason*, 278; *Owens v. Hart*, 621.
- " 1998. Homestead: Platting. *Owens v. Hart*, 621.
- Sec. 2086, 2087. Assignment of account. *Wing v. Page*, 68 *et seq.*; *Bailey v. U. P. R'y Co.*, 359.
- " 2116. Assignment for benefit of creditors: Assent. *Palmer v. Palmer*, 204.
- " 2131. Mechanic's lien: Notice. *Nash & Phelps v. C. M. & St. P. R'y Co.*, 50.
- " 2207. Husband and wife. *Rawson & Rice v. Spangler*, 61.
- " 2224. Temporary alimony. *Finn v. Finn*, 485.
- " 2408, 2411, 2421. Claims against estates of decedents. *Bayless v. Powers*, 601 *et seq.*
- " 2440, 2182. Will: Consent to terms of. *Houston v. Lane*, 293 *et seq.*
- " 2508. Equitable jurisdiction. *Bushnell v. Robeson*, 516.
- " 2637. Statute of limitations. *Dist. Twp. of Spencer v. Dist. Twp. of Riverton*, 81.
- " 2646. Account stated. *Wing v. Page*, 69.
- " 2572, 2573, 2574. Replevin: Substitution of defendants. *Maish v. Littleton*, 106.
- " 2684. Insurance companies: Jurisdiction. *State Ins. Co. v. Granger*, 274.
- " 2590, 2592. Change of venue. *Schuchart v. Lamney*, 199.
- " 2594. Change of venue. *Sweet v. Wright*, 216.
- " 2612, 2613. Corporation: Service on agent. *State Ins. Co. v. Granger*, 274; *Philp v. Covenant Mut. Ben. Assn.*, 634 *et seq.*
- " 2646. Pleading: Separate counts. *Cruzer v. C. M. & St. P. R'y Co.*, 462.
- " 2650. Pleading: Objection waived. *Cruzer v. C. M. & St. P. R'y Co.*, 462; Motion in arrest of judgment. *Seymour v. Shea*, 712.
- " 2665, 2666, 2667. Pleading: Reply. *Meadows v. Hawkeye Ins. Co.*, 389 *et seq.*
- " 2710. Pleading inconsistent defenses. *Meadows v. Hawkeye Ins. Co.*, 382.
- " 2742. Trial on depositions. *Peters v. Ham*, 656; Trial *de novo*. *Andrews v. Burdick*, 721 *et seq.*; Agreed statement of facts as evidence. *Williams v. Wells*, 746.
- " 2746. Statute of limitations. *Goodnow v. Stryker*, 224.
- " 2789. Exceptions: When taken. *Nagel v. Guittar*, 610.
- " 2827. Reference of cause. *Townsend v. Wisner*, 672.
- " 2831. Exceptions: When taken. *Nagel v. Guittar*, 610.
- " 2338. New trial: Time of moving for. *Ewaldt v. Farlow*, 214.
- " 2877. Service by publication: New trial. *Williamson v. Wachenheim*, 197.
- " 2933. Costs. *McClatchie v. Finley*, 201.
- " 2976. Garnishment of county. *County of Des Moines v. Hinkley*, 616.
- " 2979, 2980. Garnishment. *Bailey v. U. P. R'y Co.*, 353.
- " 3010. Attachment: Return: Evidence. *Rock & Son v. Singmaster*, 512.
- " 3037. Execution: Life of. *Cox v. Currier*, 534.

- Sec. 3355. Execution: Levy: Claim by third party. *Parsons v. Thomas*, 320; *Baxter v. Ray*, 337.
- " 3092. Judgment against decedent. *Bayless v. Powers*, 692.
- " 3102, 3103. Redemption from judicial sale. *Newell v. Pennick*, 125.
- " 3154. Vacating judgment. *Thomas v. Hoffman*, 128; *Town of Storm Lake v. I. F. & S. C. R'y Co.*, 219.
- " 3151, 3157, 3158. Vacating judgment. *Teaboul v. Roper*, 603.
- " 3173. Appeal: Certificate. *Foye v. Walker*, 252; Application to chancery cases. *Andrews v. Burdick*, 720 *et seq.*
- " 3179. Appeal: Transmitting transcript. *Dedric v. Hopson*, 567.
- " 3184. Practice in supreme court. *Andrews v. Burdick*, 722.
- " 3186. Supersedeas bond: Recovery on. *Gill v. Sullivan*, 530 *et seq.*
- " 3193. Supersedeas bond: Penalty. *Flynn v. Des M. & St. L. R'y Co.*, 522.
- " 3321. Redemption from foreclosure sale. *Newell v. Pennick*, 124; *Spurgin v. Adamson*, 664.
- " 3236. Judgment in replevin. *Hardy v. Moore*, 68.
- " 3331. Nuisance. *Bushnell v. Robeson*, 543 *et seq.*
- " 3345, 3330, 3367. Quo warranto. *Quinn v. Shields*, 140.
- " 3386. Injunction. *Stafford v. Shortreed*, 526 *et seq.*; *Bushnell v. Robeson*, 546 *et seq.*
- " 3403, 3409. Agreed case: Jurisdiction. *Keeline v. City of Council Bluffs*, 451.
- " 3376, 3597. Appeal from justice: Time of taking: Judgment on bond. *Martin & Sellers v. Crocker*, 323 *et seq.*
- " 3639. Evidence. *Palmer v. Palmer*, 203.
- " 3650. Evidence: Letters. *B. C. R. & N. R'y Co., v. Sherwood*, 314.
- " 3741. Deposition: Unimportant deviation. *Byington v. Moore*, 476.
- " 3777. Reporter's notes. *Hampton v. Moorhead*, 95.
- " 3814. Witness in criminal case: Compensation. *Westfall v. Madison County*, 428.
- " 4241, 4242, 4243. Preliminary examination. *State v. Rodman*, 433.

- " 4421 Modified by subsequent statute. *State v. Rodman*, 458.
- " 4561. Magistrate's subpoena in criminal case: Jurisdiction. *Westfall v. Madison County*, 428.
- " 4715. Illegitimate child. *State v. Shoemaker*, 343.

LAWS OF 1874.

- Chap. 68. Railroad tariff law. *Steever v. Ill. Cent. R'y Co.*, 372 *et seq.*

LAWS OF 1876.

- Chap. 59. Minors in saloons. *State v. Probasco*, 402.
- " 100. Mechanics' liens. *Andrews v. Burdick*, 718.

LAWS OF 1878.

- Chap. 25. (Miller's Code and McClain's Statutes § 3761) Notice of filing depositions. *Byington v. Moore*, 477.

LAWS OF 1880.

- Chap. 95. Railways on streets. *Stange v. City of Dubuque*, 305 *et seq.*
- " 119. Street railway in Dubuque. *Stange v. City of Dubuque*, 304.
- " 130, Sec. 5. Criminal practice: Grand jury. *State v. Rodman*, 458.
- " 158. Board of health. *Staples v. Plymouth County*, 365 *et seq.*
- " 194. Taxation: Exemption for trees. *Shiner v. Jacobs*, 393.

CONSTITUTION OF IOWA.

- Art. 3, Sec. 30. Special legislation. *Stange v. City of Dubuque*, 305; *Ind. Dist. of Union v. Ind. Dist. of Cedar Rapids*, 619.
- Art. 5, Sec. 4. Jurisdiction of supreme court. *Andrews v. Burdick*, 720 *et seq.*

CONSTITUTION OF THE UNITED STATES.

- Art. 10, Sec. 1. Vested rights. *Shiner v. Jacobs*, 393.

STATUTE OF LIMITATIONS.

1. **EQUITABLE ACTIONS.** The statute of limitations applies to actions in equity as well as at law. *Relf v. Eberly*, 23 Iowa, 467, followed. *Dist. Twp. of Spencer v. Dist. Twp. of Riverton*, 30.
2. **NEW ACTION AS CONTINUATION OF A FORMER ONE.** While the time for the commencement of an action may be extended by section 2537 of the Code, in a case where a former action has failed for any cause other than negligence, that section does not extend the time for bringing into existence the conditions without which no action can be maintained. Accordingly, where a demand was necessary, and it was not made until after the time of the statute had run against the claim, held that the claim was barred, notwithstanding it might otherwise have been saved under the provisions of said section. *Id.*

3. **EXPRESS TRUST.** Where a party takes possession of money and holds it in the discharge of an express trust, he cannot set up the statute of limitations to shield him from liability for the improper discharge of the trust. But by the facts of this case (see opinion) no trust was created. *Dist. Twp. of Jasper v. Dist. Twp. of Wheatland*, 62.
4. **STATUTES CONSTRUED.** Section 2746 of the Revision provided that "when a cause of action has been fully barred by the laws of the country where the defendant has resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter;" but, by chapter 167 of the laws of 1870, said section was made inapplicable where the cause of action arose in this state. *Held* that section 2746 could not avail as a defense against a cause of action arising in this state, unless the action was fully barred at the time of the taking effect of chapter 167, Laws of 1870. *Goodnow v. Stryker*, 221.
5. **WHEN IT BEGINS TO RUN: ACTION ON PROMISE BASED ON CONTINGENCY.** As against an action brought upon an implied promise which is based upon a contingency, in such a manner that it is not enforceable until the happening of the contingency, *held* that the statute of limitations does not begin to run until the contingency is past, and the promise has become absolute. *Id.*
6. **WHEN IT BEGINS TO RUN.** See Promissory Note, 3.
7. **IN RELATION TO CLAIMS AGAINST ESTATES.** See Estates of Decedents, 3.
8. **THE RUNNING OF NOT DELAYED BY NEGLIGENCE IN MAKING DEMAND.** Where the right of action depends upon some act of the plaintiff, such as the making of a demand, he cannot, by failing to do such act, prevent the statute of limitations from running. And in this case, where plaintiff seeks to recover of the defendant for the appropriation of land for right of way, and defendant sets up as an equitable defense a written agreement of plaintiff to convey the land upon demand after the location of its road, and defendant neglected for more than ten years after the location of its road to demand a deed, *held* that, in the absence of special circumstances excusing the delay, the cause of action pleaded as an equitable defense was fully barred, whether it be regarded as a cause of action based on a written contract, or an action brought for the recovery of real property. *Ball v. Keokuk & N. W. R'y Co.*, 751.

STOCK RUNNING AT LARGE.

1. **INJURY TO HORSE FALLING INTO OPEN PIT: LIABILITY OF OWNER OF PIT.** See Negligence, 2.
2. **DUTY OF RAILWAY COMPANIES IN REGARD TO.** See Railroads, 16.

SUBROGATION.

1. **WHO ENTITLED TO.** See Equity, 5.

SUPERSEDEAS BOND.

1. **AMOUNT OF PENALTY.** See Appeal, 8.
2. **RECOVERY UPON LIMITED BY TERMS OF.** See Bond, 6.

SUPREME COURT.

1. **PRACTICE IN.** See Practice in Supreme Court.

2. RULES OF FOR ADMISSION OF ATTORNEYS TO THE PRACTICE OF LAW IN IOWA, 760.

SURETY.

1. DISCHARGE OF BY EXTENSION OF TIME THROUGH COMPOSITION WITH CREDITORS. Where plaintiff and other creditors of the principal debtor for a valuable consideration entered into an agreement with the latter, whereby they agreed, on certain terms therein named, to discount their claims, and such agreement involved an extension of time upon plaintiff's demand, *held* that by such agreement the surety, who did not consent thereto, was discharged. *Lambert v. Shitler*, 72.
2. CONTRIBUTION: INDEMNITY TO ONE INURES TO BENEFIT OF ALL. Where one of several sureties receives a fund by way of indemnity, it inures to the benefit of all; and, it appearing from the evidence herein that plaintiff has been indemnified to the full extent of payments made by him, he is not entitled to recover contribution from his co-sureties. *Reinhart v. Johnson*, 155

TAX.

1. PAYMENT UPON ANOTHER'S LAND UNDER BELIEF OF OWNERSHIP: RECOVERY FROM OWNER. Where one in good faith, believing himself to be the owner of land, pays the taxes upon it, and afterwards the land is adjudicated to belong to another, the law raises an implied promise on the part of that other to reimburse the one who has paid the taxes for his benefit, and on such implied promise an action will lie. *Goodnow v. Moulton*, 51 Iowa, 555, followed. *Goodnow v. Stryker*, 221.
2. MEANING OF TERM. An agreement in a lease "to pay all taxes assessed * * * during the continuance of the lease" includes special assessments for local improvements, such as for paving and curbing the adjacent street. *Cassady v. Hammer*, 359.
3. SCHOOL DISTRICT HAS VESTED RIGHT IN. See School District, 4.
4. RECOVERY OF BY GRANTEE OF PAYOR. Where S., who had obtained by fraud the title to land, paid certain taxes thereon, and afterward conveyed it to H., in an action in equity against S. and H. by S.'s grantor to set aside the conveyance, *held* that, upon a decree for plaintiff after S. had ceased to be a party to the suit, H. was not entitled to judgment against plaintiff for the taxes paid by S. *Seymour v. Shea*, 708.

TAXATION.

1. EXEMPTION FROM: REPEAL OF BY SUBSEQUENT LEGISLATURE: CONSTITUTIONAL LAW. Where an exemption from taxation is provided by the general laws of the state upon certain conditions, persons complying with the conditions do not thereby acquire such vested rights against the state as to deprive a subsequent legislature of the power to alter the law and modify and remove the exemption. So *held* in this case, involving the right of the legislature to modify § 793 of the Code, providing exemption to persons planting forest trees. *Shiner v. Jacobs*, 392.

TAX SALE AND DEED.

1. TAX SALE: REDEMPTION FROM: WHEN RIGHT EXPIRES. The right to redeem land sold for taxes expires in ninety days after completed service of the notice required by section 894 of the Code, whether the deed is then executed or not. *Ellsworth v. Low, Adams & French*, 178.

2. ———: NOTICE TO REDEEM ON PERSON IN POSSESSION: WHAT CONSTITUTES POSSESSION. Where land sold for taxes was not fit for cultivation, and was not occupied by any one, but was used by the owner, who lived in the same county, for a timber lot, from which he cut timber and got his wood until the timber and wood were all removed, *held* that he was in possession of the land in such sense as to be entitled to personal service of the notice to redeem from the tax sale, under section 894 of the Code, and that service by publication only, in such case, was not sufficient to cut off the right of redemption. *Id.*
3. ———: REDEMPTION BY MORTGAGEE. One who has a mortgage interest in land may redeem it from tax sale, and, if the mortgagee is dead, his administrator may redeem. *Id.*
4. ———: REDEMPTION BY ONE OF SEVERAL LIEN HOLDERS INURES TO BENEFIT OF ALL. Where several persons have liens upon land sold for taxes, and one of the lien holders redeems, the title of and liens on the land stand and exist thereafter in the same manner as though no sale for taxes had ever been made. *Id.*
5. DEFECTIVE NOTICE: CERTIFICATE NOT MERGED IN VOID DEED. Where the holder of a certificate of purchase at tax sale surrendered his certificate and obtained a deed upon a defective and insufficient notice of the expiration of the time of redemption, the deed was void, and the surrender and cancellation of the certificate were also void, and the holder thereof had the right thereafter to proceed thereunder to lay the foundation for a deed by giving proper notice. *Long v. Smith*, 329.
6. REDEMPTION FROM: OFFER TOO LATE. Where the owner of land sold for taxes does not offer to redeem until after the holder of the certificate is entitled to a deed, which he is prevented from obtaining only by an injunction wrongfully sued out by the owner, the offer comes too late, and the title passes to the holder of the certificate. *Id.*
7. TAX DEED: ACTION TO QUIET TITLE UNDER: PRESUMPTION THAT TAX WAS DULY LEVIED: EVIDENCE TO REBUT. In an action to quiet the title to a lot under a tax deed, made pursuant to a sale for a special tax levied by a city for sidewalk purposes, the tax deed was *prima facie* evidence that the tax was duly levied; but this presumption was fairly rebutted where it appeared that, under the charter and ordinances of the city, the levy, if made, should appear of record in a book kept in the office of the city recorder for the purpose of showing the proceedings of the city council, and such book, being produced, duly authenticated and un mutilated, and covering the time when the levy should have been made, contained a record of certain action of the council in relation to the sidewalk in question, but no record of the levy of the tax on which the tax deed was based. It was not necessary, to rebut the presumption raised by the deed, to show also that a certain "minute book," which might have contained a memorandum of the levy, did not; as that was a book in the nature of a private memorandum, not provided for by law. *Hintrager v. Kiene*, 605.
8. ———: ———: INCOMPETENT EVIDENCE OF LEVY. In such a case, a paper purporting to be a resolution of the city council for the levy of the tax in question, indorsed "adopted" in the handwriting of the city recorder at the time, is not competent evidence of the levy, not being such a record as the law provides. *Id.*
9. ———: ———: EVIDENCE OF DEFENDANT'S TITLE. While it is provided by statute that "no person shall be permitted to question the title acquired by a treasurer's deed, without first showing that he, or the person under whom he claims title, had title to the property at the time of

the sale," yet, where the persons questioning the tax title are allowed to testify that they were the owners of the property at the time of the sale, and are not required to produce the record evidence of their title, this is a sufficient basis for the introduction of other evidence, assailing the tax title. *Id.*

TENANCY IN COMMON.

1. OF CORN PURCHASED WITH ANOTHER'S MONEY: FACTS NOT CONSTITUTING. See Contract, 7.

TENDER.

1. OF PURCHASE-PRICE, TOGETHER WITH DEMAND, NECESSARY TO SUSTAIN ACTION FOR NON-DELIVERY OF PROPERTY PURCHASED. See Sale, 1.
2. ADMITS AMOUNT TO BE DUE. See Attachment, 3.
3. ADMISSION OF LIABILITY: COSTS. Where an action is brought upon a cause which has been merged in an award of arbitration, although no recovery could be had thereon, yet, if defendant appears and pleads the award, and tenders the amount thereof, he thereby admits that the cause of action still subsists, and his liability thereon to the amount of the tender; and, so admitting, he cannot avoid the payment of the costs made upon the trial. He should have tendered the costs accrued at the time he tendered the amount of the award. *Martin v. Whisler*, 416.

TORT.

1. FALSE REPRESENTATIONS AS TO ANOTHER'S RESPONSIBILITY: LIABILITY OF MAKER: HOW AFFECTED BY HIS KNOWLEDGE. See False Representations, 1.
2. EJECTMENT OF LEWD WOMAN FROM PASSENGER STATION. See Railroads, 9.

TOWNSHIP CLERK.

1. CUSTODIAN OF ROAD FUNDS: ACTION ON SUPERVISOR'S BOND. The township clerk, and not the trustees, is the legal custodian of the funds of a road district, so far as road supervisors are required to account therefor; and the trustees cannot maintain an action upon the bond of a road supervisor on account of his failure to account for such funds. *Keller v. Bare*, 468.

TOWNSHIP TRUSTEES.

1. ARE NOT CUSTODIANS OF ROAD FUNDS, AND CANNOT SUE ON ACCOUNT THEREOF ON ROAD-SUPERVISOR'S BOND. See Township Clerk, 1.

TRESPASSING ANIMALS.

1. HORSE FALLING INTO OPEN PIT: LIABILITY OF OWNER OF PIT. See Negligence, 2.

TRUST.

1. FACTS NOT CONSTITUTING. See Statute of Limitations, 3.

2. **TRUST ESTATE: WORDS TO CREATE BY WILL.** See Will, 3.
3. **RESULTING: FACTS NOT CONSTITUTING.** Where a testator provided in his will that his widow should have the use and benefit of his farm for the support and education of his children until one of them should become of age, and that it should then be sold, and the proceeds be divided among his heirs, but the widow, with no further power, sold the land and gave a bond to the purchaser to procure for him a good title in the future, and then purchased other lands with the consideration money, *held* that the widow conveyed only her own interest in the land, whatever that was, and that the interest of the heirs remained intact; that the consideration money paid the widow in excess of her interest was in consideration of her bond; that the heirs had no resulting trust estate in the land purchased by the widow, and that the plaintiff, one of the heirs, did not acquire such trust estate by the fact that he was induced by the widow, after his majority, to convey his interest in the original land to the widow's grantee, upon her representation that she held the land purchased by her in trust for the heirs. *Hadley v. Stuart*, 267.
4. **TRUSTEES HAVE RIGHT TO USE TRUST FUND TO EXECUTE TRUST.** See Contracts, 17.
5. **ATTORNEY GUILTY OF FRAUD CHARGED AS TRUSTEE.** See Attorney at Law, 3, 4.
6. **DEED OF: BENEFICIARY NOT NAMED: ENFORCEMENT OF TRUST.** A trust created by a deed which is sufficient in all respects, except that it fails to name the beneficiary, may be enforced by the real beneficiary, as against a purchaser from the trustee with notice of the trust, in a case where the name of the real beneficiary is supplied by the testimony of the trustee. *Sleeper v. Iselin*, 583.

ULTRA VIRES.

See CORPORATIONS, 3.

VENDOR AND VENDEE.

1. **CONVEYANCE OF ENCUMBERED LAND: LIABILITY OF GRANTEE.** Where land, encumbered by a mortgage and taxes, is conveyed, and there is no agreement on the part of the grantee to pay such encumbrances, he is not personally holden for them, though the land is holden. *Ritchie v. McDuffie*, 46.
2. **PURCHASE OF SUPERIOR TITLE BY VENDEE: RIGHTS AGAINST VENDOR ON COVENANTS OF WARRANTY.** Where one takes a deed with covenants of warranty, but his title proves worthless, he may yield to and acquire the superior title, and, having done so, he may resort to the covenants of warranty for the recovery of the amount expended, not exceeding the amount, with interest, paid the warrantor. The vendee cannot, in such case, be compelled to pursue equities to which he might be subrogated, for the purpose of making himself whole. *Royer v. Foster*, 321.

VENUE.

- 1 **CHANGE OF FROM CIRCUIT TO DISTRICT COURT: JURISDICTION.** The circuit court has exclusive jurisdiction of all appeals from justices of the peace in civil cases. Code, § 162. Hence, when it is desired to change the place of trial of such appeal, it must be removed to the circuit court

of another county, and not to the district court. A removal to the district court can be had, under section 2592 of the Code, only in cases of which the courts have concurrent jurisdiction. *Schuchart v. Lamme*, 197.

2. CHANGE OF AS TO PART ONLY OF DEFENDANTS. In an action against the principals and sureties in a bond, where there was but one defense, and all the defendants applied for a change of the place of trial on the ground of the prejudice of the judge against the *principals* only, it was error to grant a change as to the principals only, and to retain the case and proceed to trial as to the sureties. The whole cause should have been removed and disposed of together. *Sweet v. Wright*, 215.

VERDICT.

1. SPECIAL: AVOIDED BY NEW TRIAL. See Former Adjudication, 1.
2. EVIDENCE TO SUPPORT. Where a cause has been twice before tried before the same judge, and with the same result, and the verdict has been as often set aside, and on the third trial the judge has refused to set aside the verdict and grant a new trial, this court will not interfere, even though it may have doubts about the sufficiency of the evidence to sustain the verdict. *Hollenbeck v. The City of Marshalltown*, 21.
3. EVIDENCE TO SUPPORT. Where the evidence is conflicting, this court will not reverse a cause on the ground that the verdict is not sustained by the evidence. *Harris & Roberts v. Morgan*, 112.
4. SPECIAL: NO EVIDENCE TO SUPPORT: NEW TRIAL. Where a jury, besides its general verdict for defendant, made certain special findings on material points in defendant's favor, which had no support in the evidence, *held* that the general and special verdict should have been set aside and a new trial granted. *McCarty v. James*, 257.
5. INTEREST ON TO DATE OF JUDGMENT. A party in whose favor a verdict has been rendered is entitled to interest thereon from the date of its return to the date of judgment thereon. *Carson v. German Ins. Co.*, 493.
6. LARCENY: PRIMA FACIE CASE SUFFICIENT TO SUPPORT. See Criminal Law, 26.
7. EVIDENCE TO SUPPORT. This court cannot decide that the trial court erred in refusing to set aside a verdict, in a case where it cannot be said that the jury, in the exercise of their unbiased and intelligent discretion, could not have found as they did. *Volaw v. Diehl*, 676.
8. EVIDENCE TO SUPPORT: PRACTICE IN SUPREME COURT. This court will not overrule both the jury and the trial court upon findings based upon conflicting evidence. *Sloan v. Central Iowa R'y Co.*, 728.

WAGER.

1. LIABILITY OF STAKEHOLDER TO LOSING PARTY. Where the parties to a wager have agreed that the stakeholder shall determine who has won the wager, and pay the stakes to the winning party, the stakeholder may rely upon the agreement, and pay the stakes to the party in whose favor he decides, unless, before the payment is made, the losing party renounce the wager and demand his money, but a demand of the stakes on the ground that he has won the wager, is not a repudiation of the wager, and will not render the stakeholder liable for payment to the other party. *Okerson v. Crittenden*, 297.

WAIVER.

1. OF IRREGULARITY IN PRACTICE. See New Trial, 3.
2. OF PROOF OF LOSS BY FIRE. See Insurance, 4.
3. OF OBJECTION TO FORM OF PETITION, IF NOT MADE IN TIME. See Pleading, 8.
4. BY COUNTY OF EXEMPTION FROM GARNISHMENT. See Garnishment, 8.
5. OF FAILURE TO ASSIGN ERRORS. See Practice in Supreme Court, 42.

WARRANTY.

1. BREACH OF COVENANT OF: DAMAGES. In an action for a breach of covenant of warranty, the mere fact that there is an outstanding superior title, which has never been hostilely asserted, will not authorize the recovery of the consideration money. *Wilson v. Irish*, 260.
2. ACTION ON COVENANTS OF: BY VENDEE WHO BUYS IN PARAMOUNT TITLE: DAMAGES. See Vendor and Vendee, 2.
3. BREACH OF: MEASURE OF DAMAGES. Until some substantial injury occurs to the grantee in a deed with covenants, no recovery can be had for a breach of the covenant of seizin, except for nominal damages. *Hencke v. Johnson*, 555.

WATER COURSES.

1. RIGHT OF PROTECTION FROM OVERFLOW. Every owner of land has a right to protect himself from overflow in times of flood by water from a river, even though, by excluding the water from his own premises, he deepens it between his land and the river; and, on the same principle, a city may protect its territory from overflow by the construction of a levee, and, in the absence of negligence, will not be liable to one who owns a lot between the levee and the river. *Hoard v. City of Des Moines*, 326.

WASTE.

1. INJUNCTION TO RESTRAIN: PLAINTIFF MUST SHOW HIS TITLE. See Injunction, 1.

WILL.

1. DEVISE TO CORPORATION: ILLEGAL CORPORATE ORGANIZATION. A bequest is included within the proper definition or the term "contract;" and, when the will is admitted to probate, it is to be regarded as a contract of record. It follows, under section 1089 of the Code, that when a corporation seeks to enforce a bequest in a will duly admitted to probate, its claims cannot be resisted on the ground that it has not been legally organized; and it makes no difference that the corporation is defendant in the action, and is seeking to maintain the bequest against the assaults of the plaintiffs, who are urging against the validity of the bequest the want of legal organization in the corporation. *Quinn v. Shields*, 129.
2. DEVISE FOR LIFE: DISPOSITION OF REMAINDER BY WILL OF DEVISEE. It is competent for a testator to give by will to a friend personal and

- real property, to be by him enjoyed during his natural life, with a provision that what remains at his death shall not descend to his heirs, but shall be devised by him "to the support and management of such worthy and meritorious charitable and educational and religious institutions of the Roman Catholic faith" as the said friend may determine, and such gift will not be declared void on the ground that the ultimate beneficiaries are not sufficiently designated therein, nor on the ground that it is uncertain whether the devisee for life will execute a will designating the ultimate beneficiaries. *Id.*
3. TRUST ESTATE: WORDS TO CREATE. No particular form of words is necessary to create a trust estate by will. It is sufficient if the intent is clear. *Id.*
 4. DEVISE TO CHARITABLE CORPORATION: COMPETENCY OF CORPORATOR AS WITNESS. One of the original corporators and continuing members of a charitable corporation is a competent witness to a will whereby real and personal property is devised and bequeathed to the corporation, notwithstanding such witness may have a contingent interest in the property of the corporation upon its possible dissolution. *Id.*
 5. SUBSCRIBING WITNESS: OPINION OF AS EVIDENCE. A subscribing witness to a will should be limited to the statement of facts, and should not be allowed to state that the purpose of the writing, and of allowing the testator to sign it, was to quiet him. *Stephenson v. Stephenson*, 163.
 6. PRACTICE IN PROBATE OF: CONTESTANTS ESTOPPED. Where the contestants of a will, in order to obtain the advantage of the opening and closing of the case to the jury, admitted that the will was properly signed and witnessed, they should not have been allowed to introduce one of the subscribing witnesses to testify, in contradiction of the statement signed by her at the end of the will, that the will was not witnessed at the request of the testator. *Id.*
 7. UNDUE INFLUENCE: EVIDENCE: PRIOR DECLARATIONS. The declarations of the testator, made sometime prior to the execution of the will, to the effect that certain of the legatees named in the will were totally wanting in natural affection for him, were proper to be considered, with other evidence, as bearing upon the question whether the execution of the will was procured by undue influence. *Id.*
 8. ———: ———: SUBSEQUENT DECLARATIONS. The declarations of the testator made subsequent to the execution of the will, wherein he said: "I don't know any thing about it; they got around me and confuddled me. It is to be done over again," *held* admissible, not as showing undue influence, but as showing the effect on his mind of whatever undue influence, if any, was used to induce him to execute the will. *Id.*
 9. INSANITY OF TESTATOR: BURDEN OF PROOF. The burden of proof of insanity in the case of a will, equally with that of a deed or contract, is upon the party alleging it, and who claims the benefit of the fact when established. *Id.*
 10. REALTY TREATED AS PERSONALTY. While, under the provisions of a will, realty directed to be sold may sometimes be treated as personalty, the facts in this case do not warrant the application of the rule. *Hadley v. Stuart*, 267.
 11. ACCEPTANCE OF TERMS OF BY SURVIVING SPOUSE: STATUTE STRICTLY FOLLOWED. Under § 2440 and 2452 of the Code, the interest of the surviving husband or wife in the estate of the deceased spouse is not af-

fect by a will, unless consent thereto is entered of record within six months after notice of the provisions of the will. Consent and acceptance are not sufficient without the record entry; and the record cannot be made after the expiration of the six months. *Baldozier v. Haynes*, 57 Iowa, 683, followed. In this case, the executors of the deceased wife sought to have the consent of the husband entered after his death, as against his administrator. *Huston v. Lane*, 291.

12. CONVEYANCE IN NATURE OF: REVOCATION. See Conveyance, 6.
13. DEVISE TO UNINCORPORATED CHURCH: HOW FAR VALID. Where there is a devise of real estate to a church incapable of taking the title, because not incorporated, the devise is not void, but the legal title descends to the heirs, charged with the trust, which they will be required to execute; or a court of equity will appoint a trustee to execute the trust, until the church becomes incorporated, and acquires the capacity to hold the legal title; following *Johnson v. Mayne*, 4 Iowa, 180; but the church in such case cannot take more than one-fourth of the estate of a testator who leaves a wife, child or parent. Code, § 1101. *Byers v. McCartney*, 339.
14. DEVISE TO CORPORATION: LIMITATION OF WHERE THERE ARE HEIRS. See 13, *ante*.

WITNESS.

1. CREDIBILITY OF AS AFFECTED BY INTOXICATION. See Evidence, 47.
2. SUBPŒNAED FROM WITHOUT THE STATE: MILEAGE: LIABILITY OF COUNTY IN CRIMINAL CASE. Where a witness is subpœnaed from beyond the jurisdiction of the court, while in a civil case his mileage in reaching the court's jurisdiction could not be taxed to the party who did not subpœna him, he might recover it from the party who did subpœna him, as for service rendered and expense incurred at his request. And in a criminal case, where he is subpœnaed from beyond the state lines, to testify on behalf of the state in a case where the defendant is found not guilty, if he obeys the subpœna, he may recover of the county, in addition to his per diem and mileage within the state, mileage at the same rate for the distance from his place of residence to the state line. *Westfall v. Madison County* 426.
3. NOT COMPELLED TO DIVULGE RELIGIOUS OPINIONS. See Evidence, 60, 62.

Ex. f. R. C.

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